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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1990 by state appellate courts and federal courts are summarized and analyzed in this book. The analyses, each written by one or more experts in education law, are divided into eight topical chapters: (1) employees; (2) bargaining; (3) pupils; (4) handicapped; (5) torts; (6) sports; (7) finance; and (8) higher education. The book includes a 12-page alphabetical index of cases cited in the text as well as a 5-page subject index. (MLF)

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THE YEARBOOK
OF
EDUCATION LAW
1991

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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INTRODUCTION

This chapter covers over 200 cases reported in 1990 involving precollegiate, public-sector employees. The review excludes those cases analyzed in other sections of the *Yearbook* (e.g., higher education, collective bargaining). Those cases where procedural issues are involved are also omitted, and procedural issues in the remaining cases are deemphasized. Unlike many years in the past, 1990 saw no Supreme Court cases related to school employment; however, where Supreme Court cases from prior years are necessary for an understanding of current cases, they are mentioned. As in previous years the section on dismissal, nonrenewal, demotion, and discipline contains the largest group of cases, with many revolving around the issue of board compliance with district and state policies.

DISCRIMINATION in EMPLOYMENT

Discrimination claims can be based on a number of federal statutes, the most prominent of which is title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private institutions from discriminating on the basis of race, color, religion, sex, and national origin. Additionally, gender-based discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination against employees aged forty or older is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1866.[6] Discrimination complaints may also be pursued under section 1983 of the Civil Rights Act of 1871 which protects both constitutional and statutory rights.[7]

However, civil rights complaints must satisfy both procedural and substantive requirements before a complainant will have any possibility of success. One of the basic requirements is that complaints must be filed within the appropriate statute of limitations. Thus, teachers who had received lay-off notices on March 2, 1982, but who failed until after the

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1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d)(1).
4. 42 U.S.C. § 1601 *et seq.*
5. 20 U.S.C. § 794 *et seq.*
6. 42 U.S.C. § 1981.
7. 42 U.S.C. § 1983.

six-year statute of limitations had expired to file their reverse discrimination complaint based on an affirmative action plan excluding 20% of the positions from seniority bumping procedures, lost their cause of action when they did not file their civil rights lawsuit until May 11, 1988.[8] Likewise, discrimination suits may be subject to constitutional limitations. A sex discrimination suit brought in a Utah state court against a school district had to be dismissed under the eleventh amendment to the Constitution because the state legislature, through the state board of education, exerted control over school policies and programs and contributed to and oversaw funding of public schools. Furthermore, a possibility existed that a judgment against the school district would be paid at least partially from state funds.[9] The single most basic requirement for the civil rights complainant is stating a *prima facie* case. Thus, a black, female employee over fifty who alleged she was doing "exemplary" work when she was demoted from school principal to classroom teacher and who alleged the principalship was filled by a younger white male stated a *prima facie* case for race, sex, and age discrimination under title VII.[10]

Race

The majority of complaints alleging race discrimination under a variety of legal theories were resolved in favor of defendant school districts. A black employee discharged from his job had no claim under the thirteenth amendment since that amendment creates no independent cause of action based on race.[11] A black speech and language pathologist who had not been admitted to the school district's Principal Trainee Program, a requirement for advancement to assistant principal or principal, had not been retaliated against for having filed EEO complaints where none of the persons reviewing her application to the Program knew of the discrimination complaints.[12] A rejected black candidate for a position of assistant high school principal failed to raise a reasonable inference of pretext regarding the school district's reason for nonemployment that he had not performed as well as a white candidate in the interview process.[13] A teacher failed to establish race or gender discrimination where she had failed to apply for an open position and where, even had she applied, she lacked the necessary certification.[14] A school board assignment policy pursuant to specific state and federal directives to integrate public school faculties and staffs by establishing minimum and maximum ranges for black representation in the faculty of each school was reasonable and a strict scrutiny standard did not apply to an equal protection challenge to the policy.[15] A black custodial employee discharged after pleading guilty to a misdemeanor count of possession of marijuana was not the victim of race discrimination where three other white employees similarly situated had been discharged for drug offenses.[16]

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[8] Kuemmerlein v. Board of Educ. of Madison Metro. School Dist., 894 F.2d 257 (7th Cir. 1990).

[9] Martinez v. Board of Educ. of Emery County School Dist., 724 F. Supp. 857 (D. Utah 1989).

[10] Nelson v. School Bd. of Palm Beach County, Fla., 738 F. Supp. 478 (S.D. Fla. 1990).

[11] Doffoney v. Board of Trustees for Beaumont Indep. School Dist., 731 F. Supp. 781 (E.D. Tex. 1989).

[12] Featherson v. Montgomery County Pub. Schools, 739 F. Supp. 1021 (D. Md. 1990).

[13] Morton v. City School Dist. of City of N.Y., 742 F. Supp. 145 (S.D.N.Y. 1990).

[14] Chambers v. Wynne School Dist., 909 F.2d 1214 (8th Cir. 1990).

However, a school district victory will not necessarily impose a penalty on the unsuccessful civil rights complainant. Summary judgment for a defendant school district in a race discrimination case did not warrant Rule 11 sanctions for attorney fees and costs against plaintiffs or their attorneys even though the EEOC had made determinations for the defendant and plaintiffs had failed to pursue discovery to attempt to find evidence of intent to discriminate. Because of the salutory purpose served by laws that seek to ameliorate racial discrimination ''disincentives to their invocation should be erected only with care.''[17]

In a case involving a shifting burden of proof, presentation of evidence by a black complainant that school district reasons for its employment decision were pretextual, should have entitled the district to a further opportunity to present additional evidence to meet its preponderance of evidence burden of proof that its reasons were not pretextual. As a result, this case was remanded to provide the school district just such an opportunity.[18]

Successful race discrimination complainants have tended to prevail where they have been able to prove that the school district reasons for employment decisions were pretextual or disparately impacted employees on a racial basis. A discharged black custodian prevailed in his title VII disparate treatment case by persuading the court through the credibility of his own testimony, as opposed to that of the building principal and his two co-workers, that the school district's proffered reason of insubordination for discharging him was pretextual; similar insubordination by the other two co-workers had been treated differently than for the black discharged employee.[19] A black nontenured former school band director was able to establish a title VII disparate impact claim after he had been dismissed following a criminal charge of possession of two marijuana cigarettes, but was not reinstated when the criminal charges were eventually dismissed. Two white teachers who in the past had been charged with misde-

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15. Vaughns v. Board of Educ. of Prince George's County, 742 F. Supp. 1275 (D. Md. 1990).
16. Doffoney v. Board of Trustees for Beaumont Indep. School Dist., 741 F. Supp. 125 (E.D. Tex. 1990).
17. Tutton v. Garland Indep. School Dist., 733 F. Supp. 1113, 1118 (N.D. Tex. 1990).
18. Jamison v. Rockaway Township Bd. of Educ., 577 A.2d 177 (N.J. Super. Ct. App. Div. 1990).
19. Quincy School Dist. No. 172 v. Human Rights Comm'n, 555 N.E.2d 21 (Ill. App. Ct. 1990).

meanor offenses of shoplifting and driving under the influence had each been given a second chance by the school board and had been reinstated. However, the nontenured plaintiff was entitled to only one year's back pay and no front pay. Moreover, he was not entitled to reinstatement because reinstatement some seven years after his 1982 dismissal would "result in displacement of an innocent third party who is presently the band director."[20]

In a case involving more substantial penalties for discrimination, two assistant varsity football coaches (one Caucasian and the other Hispanic), removed from the varsity team and assigned to the sophomore team to make room for two black coaches, were found to have been discriminated against on the basis of race. Although each coach received only $1.00 damages for an equal protection violation, each also received $5,000 damages for mental anguish, as well as costs and attorney fees. Injunctive relief was granted to one plaintiff who had requested reassignment but not to the other who had withdrawn his request.[21] In a similar case a white social worker, discharged as part of a RIF during which the school district had elected to retain a less-senior black social worker, was entitled to back pay under her successful title VII lawsuit.[22]

In an unusual case involving an informal nepotism policy, a school district's nepotism practice in filling teaching positions without advertising, with the result that most positions were filled by white applicants, had a disparate impact on potential black applicants and warranted a prospective injunction against the practice.[23]

Religion

Only one case was reported in this section. A teacher who had worn a head wrap as an expression of her religion could be discharged for refusing to abide by the school's dress code for faculty and students, but was nonetheless entitled to unemployment compensation benefits because her head wrap was a protected "form of both religious and cultural expression."[24]

Sex

Complainants were about evenly divided between success and failure in sex discrimination cases. A federal district court had no jurisdiction to hear a title VII complaint based on alleged sex discrimination where the complainant waited fourteen months after her notice of nonrenewal to file a complaint, long after the 180 days required under title VII.[25] A female teacher failed to establish a *prima facie* case of sex discrimination where she had been denied extension of educational leave and relief from administrative assignment while two male teachers had been granted such leaves and relief. The court noted, however, that the female teacher was not seeking an initial leave, that the needs of the departments were different, and that she had already been granted administrative relief following return from her leave which had been without precedent.[26]

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[20] Daniels v. City of Alcoa, 732 F. Supp. 1467, 1478 (E.D. Tenn. 1989).

[21] Covington v. Beaumont Indep. School Dist., 738 F. Supp. 1041 (E.D. Tex. 1990).

[22] Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431 (10th Cir. 1990).

[23] Thomas v. Washington County School Bd., 915 F.2d 922 (4th Cir. 1990).

[24] Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990).

In a reverse discrimination case, a school district decision to hire a female over a male was upheld. The school proffered a legitimate, nondiscriminatory reason for hiring a female over a male because the female had work experience in the area needed even though the male's academic degree was in the advertised degree area while the female's was not, and because the female performed better during the job interview in responding to questions.[27]

Complainants were successful in a number of cases involving benefits, disparate impact, harassment, and amount of damages. In a case of some importance, the Third Circuit has determined that a provision in a collective bargaining agreement allowing only female teachers one year's leave without pay for childbearing contravened title VII and was thus *per se* void to the extent it granted leave beyond the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions.[28] In a case involving an individual teacher, a female teacher denied an administrative position stated a *prima facie* case of sex discrimination because she had greater seniority than men hired for the position and because she presented evidence of statistical gender disparity between teachers and administrators.[29] In a case broadening evidence permitted in sex discrimination cases, a female employee alleging both gender discrimination and unlawful retaliation was permitted to introduce evidence regarding specific complaints of sexual harassment against other employees to attempt to establish an atmosphere of condoned sexual harassment in the work place, thereby increasing the likelihood of retaliation for complaints in individual cases.[30] In a case of significance for damages determination, a female teacher, who a federal appeals court determined had been intentionally discriminated against under a disparate impact theory for at least four of eight administrative positions for which she had been denied, was entitled to both back pay and front pay. The difficulty in calculating the damages because of the numerous positions involved and the varying salaries of each position was not a sufficient reason to deny relief and, due to the intentional nature of the discrimination, "any ambiguities in the amount of salary owed [plaintiff] should be resolved against the school."[31] On remand, the teacher's measure of damages of front pay was determined to consist of the difference between the teacher's current salary and the salary of a junior high school principal, until such time as she could be placed into the position of principal.[32]

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[25] Kapusta v. Rockwood Area School Dist., 732 F. Supp. 567 (W.D. Pa. 1989).

[26] Baker v. Board of Educ. of the West Irondequoit Cent. School Dist., 550 N.Y.S.2d 762 (App. Div. 1989).

[27] Collins v. School Dist. of Kansas City, Mo., 727 F. Supp. 1318 (W.D. Mo. 1990).

[28] Schafer v. Board of Pub. Educ. of the School Dist. of Pittsburgh, 903 F.2d 243 (3d Cir. 1990).

[29] Perilli v. Board of Educ. Monongalia County, 387 S.E.2d 315 (W. Va. 1989).

[30] Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990).

National Origin

This form of discrimination appears to be seldom litigated; but employees prevailed in two reported cases and lost in one. Where a terminated employee appearing *pro se* and, alleging national origin discrimination, named her supervisors rather than the school board as defendants in her title VII suit, the district court improperly had refused to permit her request to amend her complaint since the school board's attorney was already handling the defense and the board would not therefore be adversely affected.[33] An English teacher of Chinese descent who had not been selected as department chairperson stated a civil rights cause of action against a black high school principal who selected a black female. The two-year statute of limitations under state law did not begin to run until the rejected teacher received written notice of his nonselection in September 1987 and thus his complaint filed August 17, 1989 was timely.[34] A naturalized American of Asian descent who had been turned down for a promotion to the position of printer in favor of a black employee lost in his title VII claim when he was unable to prove that the employer's reason for not promoting him was pretextual. The employer viewed both persons as equally qualified but selected the black employee because he had worked for the acting director the previous summer and the acting director had been impressed with the way he had handled responsibilities.[35]

Age

Complainants alleging age discrimination met with mixed success. All but one of the cases decided against complainants were resolved on procedural grounds. Teachers who had failed to pass a compulsory state-administered certificate examination could not be considered to be state employees under the Fifth Circuit's hybrid economic realities common law control test so as to enable them to maintain an ADEA action.[36] An employee who had filed an ADEA complaint was time-bound from filing a state tort claim for wrongful discharge and outrage based on discriminatory acts where the tort claim was filed more than three years after her resignation. The statute of limitations would not be tolled on equitable principles where the employee was aware of factual elements of age discrimination at the time she filed her ADEA complaint.[37] Comparing an age discrimination case to cases involving title VII or section 1983, a federal appeals court refused to appoint an attorney for a complainant where there was no more likelihood of successful litigation by the same complainant than in the past and where complainant had demonstrated adequate ability in past litigation to represent himself.[38] A three-year collective bargaining agreement which had a one-time early retirement incentive, later eliminated in the next three-year agreement, did not discriminate against a teacher on the basis of age. "[U]nless [an] employee benefit plan has the purpose and effect of retaliating against employees who have filed age discrimination claims, or of discriminating among employees in terms of salaries, hiring practices, or other nonfringe benefit areas, a *bona fide* retirement plan which makes age-based distinctives does not violate the ADEA."[39]

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[31] Willis v. Watson Chapel School Dist., 899 F.2d 745, 747 (8th Cir. 1990).

[32] Willis v. Watson Chapel School Dist., 749 F. Supp. 923 (E.D. Ark. 1990).

[33] Santiago v. Wood, 904 F.2d 673 (11th Cir. 1990).

[34] Wohl v. Cleveland Bd. of Educ., 741 F. Supp. 688 (N.D. Ohio 1990).

[35] Silpacharin v. Metropolitan Gov't of Nashville and Davidson County, 797 S.W.2d 625 (Tenn. Ct. App. 1990).

Successful plaintiffs in several ADEA cases have been victorious in situations involving changes in contracts, nonhires, and the exclusiveness of a state law remedy. A school which changed an instructor's employment contract from "continuing" to "annual" when he turned seventy violated ADEA by depriving the instructor of tenure.[40] A female teacher, who had been turned down for two administrative positions, both of which had been filled by younger men and who had been awarded damages of $76,383 equal to lost pay under ADEA, was entitled to reinstatement or front pay.[41] In a procedural case involving the interfacing of state and federal law, a federal district court determined that existence of a state law remedy for breach of an employment contract did not preclude an ADEA action.[42]

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[36] Fields v. Hallsville Indep. School Dist., 906 F.2d 1017 (5th Cir. 1990).

[37] Douchette v. Bethel School Dist. No. 403, 795 P.2d 162 (Wash. Ct. App. 1990).

[38] Salmon v. Corpus Christi Indep. School Dist., 911 F.2d 1165 (5th Cir. 1990).

[39] Gabarczyk v. Board of Educ. of City School Dist. of Poughkeepsie, 738 F. Supp. 118, 121 (S.D.N.Y. 1990).

[40] EEOC v. School Bd. of Pinellas County, Fla., 742 F. Supp. 622 (M.D. Fla. 1990).

[41] Farber v. Massillon Bd. of Educ., 917 F.2d 1391 (6th Cir. 1990).

[42] Pack v. O'Quinn, 747 F. Supp. 358 (E.D. Ky. 1990).

Handicap

Handicap has been a limited cause of action, and has resulted in differing conclusions. A school district discriminated against a school bus driver on the basis of physical handicap when it assigned him to a newly created position of night custodian which, because of the heavier physical demands upon his heart, caused him to resign.[43] A school principal, whose contract was nonrenewed for a variety of reasons, including economic factors, a lack of proper certification, and alcohol-related problems, failed to state a *prima facie* case under the Rehabilitation Act because he was not excluded from his position "*solely by reason of his handicap.*"[44]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Speech

A majority of cases involving free expression were decided in favor of school employees. Statements by a superintendent of schools in support of a particular slate of candidates for election to the school board was a matter of public concern and was thus constitutionally protected, even though he may have been motivated in part by a desire to retain his job through the election of candidates who favored retaining him.[45] A nontenured, noninstructional employee-at-will, who was transferred at the same salary from her position of secretary to an elementary school principal to a newly created, menial, make-work position after she had transferred her daughter from the public school to a private, all-white school, had her free speech and family privacy rights violated. She was entitled under section 1983 to at least nominal damages of $1.00.[46] Two persons holding central office administrative positions, one of which ran unsuccessfully against the school superintendent in his reelection and the other who, while serving on the county commission, voted to audit the superintendent's reimbursements, were entitled to reinstatement and back pay after the superintendent had reassigned them to teaching positions, thus acting in retaliation for their exercise of free speech.[47] A nontenured teacher who had been nonrenewed was entitled to a jury trial as to whether the teacher's first amendment conduct was the motivating factor in her nonrenewal. In this case the court found that the teacher's refusal to retract school newspaper articles allegedly portraying the school in a negative light and her advising students of their right to refuse to retract the articles were protected free expression.[48] A special educator, who received a written reprimand and whose contract was unsuccessfully sought to be nonrenewed after speaking out at a meeting and writing an article in her own name and not as a representative of her school district, stated a section 1983 cause of action for suppression of her right to speak, even though plaintiff suffered no actual damages.[49] A teacher, who had published an article in a local newspaper criticizing a lack of school board concern for teacher turnover and who was subsequently reprimanded by the board for insubordination, was entitled to a jury trial in her section 1983 suit as to whether the reprimand was an attempt to silence her free speech rights.[50] A school district maintenance employee, who had quietly walked out of a meeting called by the superintendent regarding a referendum on new taxes and was subsequently discharged, was entitled to proceed with a section 1983 action for violating his constitutional right of free expression. Individual school board members who had voted to terminate the employee were entitled only to qualified immunity instead of absolute immunity.[51] A tenured English teacher fired from his position as advisor to the school's newspaper survived the school board's motion for summary judgment involving his section 1983 violation of speech action because material facts existed as to whether a disclaimer on the paper's masthead was in effect at the time of publication and because educators can exert less control over a school newspaper which is extracurricular and not tied to classroom instruction.[52]

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[43] Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1989).

[44] Pierce v. Engle, 726 F. Supp. 1231, 1234 (D. Kan. 1989) (emphasis in original).

[45] Kinsey v. Salado Indep. School Dist., 916 F.2d 273 (5th Cir. 1990).

[46] Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990).

[47] Bundren v. Peters, 732 F. Supp. 1486 (E.D. Tenn. 1989).

On the other hand, a tenured hi[illegible] school teacher's first amendment right of academic freedom did not [illegible]tend to the choice of a classroom management system called "Learnball," which the school district had prohibited as not benefiting the students.[53] A nonrenewed school nurse, who had spoken out over a period of several months about the school district policy permitting school nurses to administer prescription drugs with parental, but not necessarily physician, permission, lost her free speech protection because her false statements about indiscriminate administration of drugs and her continual complaints at monthly nurses' meetings rendering them unproductive had a general disruptive effect on the nursing program.[54] A probationary teacher's $50,000 damages award for violation of his free speech rights was set aside because his use of his own supplemental history reading list rather than the district's list was not a

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48. Watson v. Eagle County School Dist., 797 P.2d 768 (Colo. Ct. App. 1990).
49. Berlin v. Superintendent of Pub. Instruction, 448 N.W.2d 764 (Mich. Ct. App. 1989).
50. Ridgeway v. Kiowa School Dist. C-2, 794 P.2d 1020 (Colo. Ct. App. 1989).
51. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990).
52. Romano v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989).
53. Bradley v. Pittsburgh Board of Educ., 910 F.2d 1172 (3d Cir. 1990).
54. Johnsen v. Independent School Dist. No. 3 of Tulsa County, Okla., 891 F.2d 1485 (10th Cir. 1989).

matter of public concern.[55] At the state level, the Oregon constitutional provision prohibiting restraint of free expression did not imply a right to damages for a constitutional violation, contrary to the first amendment of the Federal Constitution, or a violation for which damages can be awarded under section 1983.[56]

Association

Successful plaintiffs in this area won with complaints about involvement with unions. A tenured teacher was held to have been dismissed in violation of a constitutional right of association for engaging in a unionization campaign, even though the school board alleged the reason was economic necessity because the board had never before discharged a tenured teacher, the teacher was senior to other tenured teachers not dismissed, the dismissal came shortly after unionization efforts, and there was no evidence that economic necessity existed.[57] Two teachers, husband and wife, who had been subject to harassment after filing grievances with the AFT and NEA, were entitled to a trial because the unconstitutionality of retaliating against an employee for participating in a union is clearly established. In this case the court made it clear that retaliation is not limited to termination, suspension, or transfer.[58] In a different kind of case, a school district sought reimbursement from its liability insurer for a $268,373.51 settlement made to ten present and former teachers who had alleged in a section 1983 suit various acts of retaliation for teachers joining a particular education association. The school district was entitled to reimbursement because the policy had no exclusion for intentional wrong doing and the exclusion for claims involving contract obligations did not apply since this section 1983 action was for breach of first amendment issues.[59]

In only one case was a school district successful in a freedom of association action. An assistant principal assigned teaching duties after she had filed a grievance, resulting in an upward improvement in her evaluation from "excellent" to "superior," lost in her claim that the assignment violated her freedom of association because freedom of association claims in relation to speech actions must meet the same public concern test as public employee free speech; plaintiff's filing of a grievance was not a matter of public concern.[60]

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[55] Kirkland v. Northside Indep. School Dist., 890 F.2d 794 (5th Cir. 1989).

[56] Hunter v. City of Eugene, 787 P.2d 881 (Or. 1990).

[57] Temple v. Board of Educ. of School Dist. No. 94, 548 N.E.2d 640 (Ill. App. Ct. 1989).

[58] Morfin v. Albuquerque Pub. Schools, 906 F.2d 1434 (10th Cir. 1990).

[59] New Madrid County Reorganized School Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990).

[60] Griffin v. Thomas, 724 F. Supp. 587 (N.D. Ill. 1989).

Religion

Only one case was reported in this area. In a case involving demotion of a school principal for quoting scriptures and referring to God in most written memos, a court ordered this case remanded to determine whether the school board had shown by convincing evidence that the principal would have been demoted even in the absence of what the school board admitted was protected conduct. The court noted that the principal had not been charged with conduct outside the protection of free exercise of religion which "posed some substantial threat to public safety, peace or order."[61] Indeed, the school board admitted that the "absolute most that [was] revealed [was] that some of [the principal's] staff were personally offended by certain of her religious utterings."[62]

Privacy

School employees lost two of three cases in this area. A continuing contract teacher dismissed on the basis of incompetency, based in part on videotapes of her teaching performance, did not have any privacy right violated because "the activity of teaching in a public classroom does not fall within the expected zone of privacy . . . . There is no invasion of the right of privacy when one's movements are exposed to public views generally."[63] The constitutional rights of a teacher, who had taken an extended leave of absence for medical reasons, were not violated where the school board refused to reinstate the teacher until she had brought all medical records to the school district's physician so he could properly evaluate her status to return to teaching.[64]

A school district policy of requiring school bus drivers to take a drug-screening urinalysis as part of an annual physical without any particularized suspicion of drug use did not violate fourth amendment rights. However, a positive drug test result by itself did not constitute "misconduct" so as to disqualify discharged bus drivers from unemployment compensation.[65]

Substantive Due Process

Violations of substantive due process tend to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive a school employee of a property right. The Tenth Circuit Court of Appeals found a jury question existed as to whether a school board could be liable for upholding discharge of an employee who had publicly opposed a bond issue. In determining school board liability under section 1983 the court declared that "the deliberate indifference standard is the appropriate one to use . . . to determine whether the requisite direct causal link exists between the alleged constitutional deprivation and the board's decision, as final policy maker, to fire [plaintiff]."[66] On the other hand, a teacher who had allegedly been dragged from her classroom by the principal failed to state a section 1983 cause of action under substantive due process analysis because of the absence of deadly force by the principal. In addition, the plaintiff failed to state that the principal's action was the result of deliberate indifference of the rights of others. Where, as in this case, state tort claims predominate, a federal district court should decline jurisdiction.[67]

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[61] Hooks v. Smith, 781 S.W.2d 522, 524 (Ky. Ct. App. 1989) (citing to Sherbert v. Verner, 374 U.S. 398 (1963)).

[62] *Id.*

[63] Roberts v. Houston Indep. School Dist., 788 S.W.2d 107, 111 (Tex. Ct. App. 1990).

[64] Strong v. Board of Educ. of Uniondale Union Free School Dist., 902 F.2d 208 (2d Cir. 1990).

[65] Independent School Dist. No. 1 of Tulsa County v. Logan, 789 P.2d 636 (Okla. Ct. App. 1989).

PROCEDURAL DUE PROCESS

Procedural due process focuses on the fairness of treatment to school employees, rather than fairness of the underlying rules which led to the judicial conflict. In a case of first impression in Minnesota, the state court of appeals determined that a school board is not required by due process to accept findings of an independent hearing officer hired by the board in termination proceedings where the issue was employee immorality; due process requires only that the school board specify its reasons for rejecting the hearing officer's findings. In addition, there is no due process requirement that the person who builds the record be the ultimate decision maker.[68] In a slightly different vein, a teacher who had filed a section 1983 suit alleging termination without notice or hearing and who was later reinstated was not entitled to a preliminary injunction against the school board preventing its terminating her without due process because there was no evidence the board intended to take similar action in the future.[69]

Liberty and Property Interests

Occasionally, a case implicates both liberty and property interests. In a teacher's section 1983 action for constructive discharge without a hearing for his exercise of first amendment rights, a court would be abusing its discretion if it stayed plaintiff's general discovery designed to determine whether any liberty or property interests were violated.[70] In Florida, an elementary school principal who had served under a series of three-year contracts and who had then been offered a one-year contract as an assistant elementary school principal at his same salary had experienced a "demotional transfer" under state statute and was entitled to a due process hearing regarding his property and liberty interests.[71]

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[66] Ware v. Unified School Dist. No. 492, 902 F.2d 815, 817 (10th Cir. 1990).

[67] Coleman v. Wirtz, 745 F. Supp. 434 (N.D. Ohio 1990).

[68] *In re* Etienne, 460 N.W.2d 109 (Minn. Ct. App. 1990).

[69] Haussmann v. Chicago Bd. of Educ., 737 F. Supp. 56 (N.D. Ill. 1990).

Property interests must find their basis in some contractual or statutory entitlement. A teacher had a procedural due process claim arising out of his alleged suspension without pay and without hearing or opportunity to be heard following his return from sick leave when the school board refused to allow him to work during pendency of his termination proceedings. The fact that the teacher ultimately received full sabbatical pay for that period following union-initiated grievance arbitration of his request for a sabbatical did not mean that there was no potential violation of due process, but only that damages ultimately awarded might be reduced.[72] Similarly, a bus driver had a property interest in his employment and, under *Cleveland Board of Education v. Loudermill*,[73] his suspension without pay, as opposed to termination, entitled him to the same *Loudermill* pretermination rights to notice and hearing. Even though his suspension was upheld at a subsequent hearing, the bus driver was entitled under *Loudermill* to wages between his suspension and the hearing.[74] A post-termination hearing required to protect a property right must provide a written notice of specific grounds for termination, an opportunity to confront and cross-examine witnesses, an opportunity to be represented by counsel, a fair-minded and impartial decision maker, and a written statement by the fact-finder as to evidence relied upon and reasons for determinations that were made.[75] A nonteaching employee whose discharge did not follow the progressive discipline procedures in the employee handbook stated a cause of action for deprivation of a property interest. "[U]nder Colorado law an employee personnel handbook may grant to an employee a property interest in continued employment which entitles the employee to the protections of the procedural due process guarantees of the United States Constitution."[76] However, an employee cannot claim a property interest in a personnel manual provision pertaining to termination, which might reasonably have contained a promise conferring an offer of employment, where the employee had not received a copy of the provision until after termination.[77]

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[70] Hovermale v. School Bd. of Hillsborough County, Fla., 128 F.R.D. 287 (M.D. Fla. 1989).
[71] French v. School Bd. of Polk County, 568 So. 2d 497 (Fla. Dist. Ct. App. 1990).
[72] Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064 (3d Cir. 1990).
[73] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
[74] Ayio v. Parish of W. Baton Rouge School Bd., 569 So. 2d 234 (La. Ct. App. 1990).
[75] Deuel v. Arizona State School for the Deaf and Blind, 799 P.2d 865 (Ariz. Ct. App. 1990).
[76] Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 694 (Colo. 1990).

In other cases courts have found no property interests. An Illinois state law which permits psychiatric examinations as part of the teacher remediation process meant that a teacher had no constitutionally protected right to be free from such examinations in a remediation plan.[78] A tenured high school teacher had no property interest in continuing his teaching and coaching at the same high school where, under the terms of his employment contract, teaching assignments were at the total discretion of the school district and coaching assignments were subject to cancellation at any time.[79] A superintendent lost his expectation of continual employment when he submitted his letter of resignation, even though the letter was conditionally accepted by the school board and the board did not vote to terminate him until one year later. A factor that may have weighed in this result is that subsequent to the board termination, the former superintendent was convicted of wrongfully converting school district property and embezzling district funds.[80]

Liberty interests involve matters of reputation and possible name-clearing hearings. Reasons given in a letter to a dismissed elementary principal for incompetence, inability to relate well with others, and lack of tact did not implicate liberty interests, even if they involved charges of moral turpitude or dishonesty, because the school district did not disclose the reasons to the public.[81]

Aspects of Notice

Issues involving employee hearings arose under both state statutes and the Federal Constitution. A teacher's nonrenewal would not be overturned even though the statutory notice requirement for nonrenewal had not been followed because the teacher had been participating in six meetings over two years documenting her continued deficiencies and the ultimate decision for nonrenewal.[82] An attorney, who had been employed by a school district to negotiate with the representative of a nonrenewed teacher, had apparent authority under state statute to waive statutory formal notice by the teacher for a board hearing. As a result, the school board was bound by its attorney's waiver.[83] In a school district's motion for definite statement of a nonrenewed teacher's constitutional claims, a federal court held that the teacher's allegation that she was directed to award a student a "C" in a course against her professional judgment "fairly appraise[d] the defendant [school board] of the claims asserted as required by federal pleading standards."[84]

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[77] Hohmeier v. Leyden Community High School Dist. 212, 748 F. Supp. 657 (N.D. Ill. 1990).

[78] Sweeney v. Board of Educ. of Mundelein Consol. High School Dist. 120, Lake County Ill., 746 F. Supp. 758 (N.D. Ill. 1990).

[79] Thomas v. Smith, 897 F.2d 154 (5th Cir. 1989).

[80] Unified School Dist. No. 457, Finney County, Kan. v. Phifer, 729 F. Supp. 1298 (D. Kan. 1990).

[81] Hayes v. Phoenix-Talent School Dist., 893 F.2d 235 (9th Cir. 1990).

[82] Krischer v. School Bd. of Dade County, 555 So. 2d 436 (Fla. Dist. Ct. App. 1990).

[83] Brennan v. School Dist. 21 of Holt County, 458 N.W.2d 227 (Neb. 1990).

Aspects of Hearing

Problems involving hearings arose at both constitutional and statutory levels. In the absence of a state statute which requires sworn testimony of witnesses at a hearing to remove a tenured teacher for neglect of duty, the teacher has no such right since sworn testimony is not "an essential element of the teacher's due process rights" to protect her property right in continued employment.[85] A dismissed school bus driver whose dismissal hearing was not held within forty-five days of dismissal as required by state statute had not been deprived of due process where she had been informed of charges against her, had been afforded a full hearing, was represented by counsel, was able to confront witnesses against her, and could not show prejudice to her as a result of the delayed hearing.[86] A tenured teacher accused of misconduct had not been denied procedural due process where the attorney appointed to serve as hearing officer for a pretermination hearing was a member of the same law firm as the attorney representing the superintendent in the disciplinary proceedings. This case must be considered in the context of the somewhat limiting factors that the school board made the discharge decision and the hearing officer expressed no opinion to the board regarding the evidence, and also that this was not a full, post-termination adjudicatory proceeding.[87]

Employees prevailed in two cases each involving bias and a resignation. The North Carolina Supreme Court applied its "one member bias" rule in upholding a section 1983, $78,000 judgment on behalf of a teacher dismissed because of the bias of one member of the school board at the hearing. Section 1983 permits recovery for mental and emotional distress caused by the due process violation itself, even if the teacher is later furnished an unbiased hearing. The fact that only one member of the board may have been biased does not offset a unanimous board decision to dismiss a teacher because "[o]ne biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations."[88] Finally, a school employee in a weakened condition who signed a prepared resignation form was entitled to section 1983 damages for failure of the school district to hold a pre-termination hearing because the post-termination hearing, which he had received, "is constitutionally adequate in instances of random and unauthorized acts by a governmental employee, and does not apply if the deprivation arises by virtue of established or authorized procedure."[89]

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[84] Motagriff v. Adams County School Dist., 128 F.R.D. 117 (D. Colo. 1989).

[85] Gaulden v. Lincoln Parish School Bd., 554 So. 2d 152, 155 (La. Ct. App. 1989).

[86] McLaughlin v. Jefferson Parish School Bd., 560 So. 2d 585 (La. Ct. App. 1990).

[87] Plymouth-Canton Schools v. State Tenure Comm'n, 457 N.W.2d 656 (Mich. 1990).

[88] Crump v. Board of Educ. of Hickory Admin. School Unit, 392 S.E.2d 579 (N.C. 1990).

DISMISSAL, NONRENEWAL, DEMOTION, and DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. A wide variety of substantive and procedural issues pertaining to teacher discipline and the broad range of effects of teacher removal are reflected in this section.

A state continuing contract law, which provided that school boards seeking to remove tenured teachers must state in detail the reasons for the proposed cancellation of a contract, was not complied with by general charges of incompetency, neglect of duty, and other good and just causes.[90] A sixty-one year old coordinator of risk and insurance programs, who was discharged at the insistence of a school board member because the coordinator would not assign legal cases to firms chosen by the school board member and would not provide employee benefit reports by a company referred by the board member, recovered damages for wrongful discharge of $348,596 for lost compensation, $125,000 for emotional distress, and $25,000 in punitive damages.[91] A teacher ordered reinstated was required under the general contract principle of damages to offset from an award of back pay any earnings received from teaching.[92]

Insubordination

The employees won two cases and lost one case in this section. According to the Kansas Appeals Court a single act of insubordination can support a dismissal. In this case a tenured teacher had called in sick after his request for a day off to be interviewed for another job had been denied.[93] A veteran teacher with a good overall record, who had acted reflexively in striking a student in response to a disrespectful gesture, could not be dismissed from her tenured teaching position for insubordination even though the teacher's act violated board of education policy.[94] A teacher who had been discharged by a school board for continuously violating directives won a victory of sorts when the Michigan Supreme Court held that his discharge could be reduced by the State Tenure Commission to a suspension.[95]

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[89] Price v. Boulder Valley School Dist., 782 P.2d 821, 825 (Colo. Ct. App. 1989).

[90] Gardner v. Alabama State Tenure Comm'n, 553 So. 2d 606 (Ala. Civ. App. 1989).

[91] Mouchette v. Board of Educ., Oakland Unified School Dist., 266 Cal. Rptr. 1 (Ct. App. 1990).

[92] Gross v. Board of Educ. of Elmsford Union Free School Dist., 552 N.Y.S.2d 334 (App. Div. 1990).

[93] Gaylord v. Board of Educ., Unified School Dist. No. 218, Morton County, 794 P.2d 307 (Kan. Ct. App. 1990).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

All but three cases in this section were decided for the school district. One of the three exceptions involved a high school teacher charged with five acts of misconduct in four years prior to the year of his discharge. The court held that he could not be discharged on grounds his behavior indicated a "pattern of conduct" that was not indicative of good judgment or good teaching behavior where the superintendent's notice of nonrenewal did not contain a reason indicating a pattern of misconduct.[96] In the second case, a teacher suspended for unprofessional conduct after using physical force toward a student, and who was acknowledged prior to his hearing to have been remediated, had been unlawfully suspended under state law.[97] In the third case, a school board's dismissal of a tenured teacher on the ground of willful neglect of duty because the teacher had failed to take a loaded gun from a student in his class or separate him from the other students, was reversed since the school district had no established policy regarding this kind of problem and the teacher was left to rely on his own judgment. In this case, no student in the class had been threatened with the gun.[98]

Failure of a tenured teacher to follow the school's adopted mathematics curriculum, poor rapport with students, insufficient communication with parents, and a lack of student progress supported the school district decision to terminate the teacher for inefficiency in teaching.[99] A tenured counselor's termination was upheld where he repeatedly was negligent in preparing referral packets on students, reporting to work on time, having numerous unexplained work absences, and failing to submit acceptable weekly and monthly plan books and yearly plans as requested of counselors.[100] An eleven-year teacher received adequate notice of a charge

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94. *Ex parte* Alabama State Tenure Comm'n, 555 So. 2d 1071 (Ala. 1989).
95. Lakeshore Pub. School Bd. of Educ. v. Grindstaff, 461 N.W.2d 651 (Mich. 1990).
96. Allen v. Texarkana Pub. Schools, 794 S.W.2d 138 (Ark. 1990).
97. Crowl v. Commission of Professional Competence of the Governing Bd. of the San Juan Unified School Dist., 275 Cal. Rptr. 86 (Ct. App. 1990).
98. Board of Educ. of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990).
99. *In re* Termination of James E. Johnson, 451 N.W.2d 343 (Minn. Ct. App. 1990).
100. Alabama State Tenure Comm'n v. Birmingham Bd. of Educ., 564 So. 2d 980 (Ala. Ct. Civ. App. 1990).

of having a student in the work area of the welding shop without proper supervision; and that charge supported the school board's decision to nonrenew the teacher's contract, especially in light of conditions regarding correction of past safety violations which had been placed in plaintiff's current contract.[101] Dismissal of an elementary teacher after pleading *nolo contendere* to one count of sexual assault stemming from sexual intercourse with a fifteen-year-old neighbor boy was upheld on the basis of unfitness to teach, reflecting "her poor judgment, her lack of concern for the emotional welfare of a public school student, and her impaired ability to deal with other sexually exploited students due to public awareness of her course of conduct."[102] Evidence that a transportation supervisor repeatedly touched female employees on their buttocks and kissed them without their consent justified dismissal even though the hearing officer had recommended only a three-month suspension.[103] A tenured teacher's discharge for touching the chests, shoulders, legs, and buttocks of elementary female students was upheld as irremediable unprofessional physical conduct unbecoming a teacher under state statute.[104] A novel case arose in Alabama as to whether a tenured teacher, who had been elected to a four-year term as county superintendent of schools, could be denied reinstatement as a tenured teacher at the end of four years on the theory that she had abandoned her contract which constituted "neglect of duty" as a statutory basis for cancellation of a teacher's contract. The Alabama Supreme Court decided that the county superintendent was a "supervisor" under the state's continuing contract statute and therefore promotion (or election) to such a position could not jeopardize a teacher's tenure status.[105]

Immorality

Employees lost all cases under this section. A permanent teacher whose responsibilities included instruction and participation in the school district's anti-drug program could be dismissed for "immorality" and "neglect of duty" where her husband, with her knowledge but not her cooperation, was using their jointly owned home to grow and sell marijuana.[106] The actions of a high school teacher, who carried on a series of discussions with one of his students as to whether they should engage in sexual intercourse, constituted sexual exploitation of a student warranting plaintiff's discharge on the basis of immoral conduct.[107] A finding that a teacher's love letters and profession of love to students constituted "immorality" under state statute also constituted "just cause" for dismissal under the collective bargaining agreement.[108] In Illinois, transportation of two female students to a teacher's home where they became intoxicated constituted irremediable immoral behavior warranting discharge.[109]

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[101] Hilliard v. Orangeburg County School Dist. Number Three, 386 S.E.2d 628 (S.C. Ct. App. 1989).

[102] Elvin v. City of Waterville, 573 A.2d 381, 383 (Me. 1990).

[103] Comeau v. Board of Educ. of Ballston Spa Cent. School Dist., 554 N.Y.S.2d 359 (App. Div. 1990).

[104] Board of Educ. of City of Chicago v. Box, 547 N.E.2d 627 (Ill. App. Ct. 1989).

[105] *Ex parte* Weaver, 559 So. 2d 178 (Ala. 1989).

[106] Jefferson County School Dist. No. 509-J v. Fair Dismissal Appeals Bd., 793 P.2d 888 (Or. Ct. App. 1990).

Incompetency

Although somewhat difficult to prove, charges of incompetency were upheld in all four reported cases. Contract termination of a permanent teacher one year short of thirty years teaching necessary to draw full pension benefits was upheld where a teacher admitted she had life-long difficulties with spelling and grammar and received complaints from two prior principals about her incompetency. Within the documents presented by the school teacher she misspelled the names of twenty-six of her students as well as her own name.[110] A teacher certified to teach science, biology, chemistry and guidance counseling, and who was later employed as a school psychologist, could be removed as incompetent as determined by the standard of school psychologists trained in the field, even though the teacher had received no formal training or education as a school psychologist.[111] A tenured teacher's conviction for failing to file income tax returns and his post-indictment conduct supported the teacher's dismissal under state statute for "incompetency, immorality, other sufficient cause, and [the] best interests of the school."[112] In termination proceedings for incompetency, failure of the county board of education to include on a bus driver's annual evaluation form the specific accidents for which he was terminated was not a fatal deviation from statutory requirements since the board had substantially complied with the statute.[113]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. In Pennsylvania, a new compensation plan whereby administrators would be paid higher salaries to work twelve months rather than ten months did not constitute a demotion where the pay per day decreased because "salary" under state statute meant an annual salary.[114] Under Oregon statutory law, a nontenured principal could be demoted and reassigned to a teaching position for ineffectiveness without the need for formal evaluation procedures. The transfer was deemed a discretionary function and the school district need only find that such transfer was in the district's best interest.[115] A school board had authority to suspend a teacher for two days without pay and deduct $146 from his pay check where the board had assessed $1.00 per book charge against the teacher for cutting out the glossaries of 146 science books.[116] Under Montana statutory law, two and one-half day disciplinary suspensions were not "dismissals" within the meaning of the statute governing dismissal of teachers under contract, and thus procedures under that statute were not available to the teacher.[117] A school board had the authority to reduce a noncertified position of personnel director of the merit system to half time because the director was an employee of the board and the reduction occurred while the position was vacant.[118] A RIFed custodian who was interviewed for a vacant custodian position but not hired was not prejudiced because the school board had failed to post notice of a classified vacancy as required by the school district's intra-district transfer policy. Failure of the school board to advertise the position "was neither detrimental nor unjust to the [plaintiff]" where he "interviewed for the position and was evaluated according to the same standards as the other applicant."[119] A school principal serving under a series of one-year employment agreements had no statutory rights of notice where his demotion to a teaching position was not for incompetency and he could not rely on a provision in the superintendent's contract that the superintendent had "primary responsibility for execution of board policy" to challenge his demotion.[120] Failure of a school district to follow its evaluation procedure did not prohibit the district from nonrenewing the contract of a probationary teacher because the teacher could have been dismissed even if she had a favorable evaluation.[121]

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[107] Sauter v. Mount Vernon School Dist. No. 320, Skagit County, 791 P.2d 549 (Wash. Ct. App. 1990).

[108] Manheim Cent. Educ. Ass'n v. Manheim Cent. School Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990).

[109] Massie v. East St. Louis School Dist. No. 189, 561 N.E.2d 236 (Ill. App. Ct. 1990).

[110] Beck v. James, 793 S.W.2d 416 (Mo. Ct. App. 1990).

[111] Harris v. Bailey, 798 P.2d 96 (Mont. 1990).

[112] McCullough v. Illinois State Bd. of Educ., 562 N.E.2d 1233, 1236 (Ill. App. Ct. 1990).

[113] Hare v. Randolph County Bd. of Educ., 396 S.E.2d 203 (W. Va. 1990).

In an interesting case involving both contract and statutory interpretation, the Nebraska Supreme Court determined that a local school board had furnished a nonrenewed superintendent with appropriate notice. School board notice of nonrenewal more than one year in advance was necessary to prevent the contract from automatically extending one more year according to the terms of the contract. But since a school superintendent was considered under state statute to be a probationary certificated employee, notice approximately four months prior to the end of the contract year with opportunity for an informal hearing was all the statutory rights to which the nonrenewed superintendent was entitled.[122]

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[114] Ahern v. Chester-Upland School Dist., 582 A.2d 741 (Pa. Commw. Ct. 1990).

[115] Odegaard v. Everett School Dist., 797 P.2d 1152 (Wash. 1990).

[116] Board of Trustees of Hamilton Heights School Corp. v. Landry, 560 N.E.2d 102 (Ind. Ct. App. 1990).

[117] Debar v. Trustees, Yellowstone County Elementary School Dist. No. 2, 796 P.2d 1081 (Mont. 1990).

[118] Personnel Comm'n of Lynwood Unified School Dist. v. Board of Educ. of Lynwood Unified School Dist., 266 Cal. Rptr. 46 (Ct. App. 1990).

[119] Ware v. Converse County School Dist. No. 2, 789 P.2d 872, 875 (Wyo. 1990).

[120] McFall v. Madera Unified School Dist., 272 Cal. Rptr. 345 (Ct. App. 1990).

[121] Leonard v. Converse County School Dist. No. 2, 788 P.2d 1119 (Wyo. 1990).

A number of cases addressed a variety of issues involving length of employment. Abolition of a supervisory category and refusal to promote supervisors to a higher category because of severe financial difficulties did not amount to a demotion under Louisiana statute where there was no reduction in salary and rank.[123] Nonrenewing a superintendent's contract for cause coupled with an offer of a public hearing did not constitute a discharge in North Dakota where the superintendent continued to function as superintendent through the remainder of the school year and received his full salary.[124] A school board's rule permitting a superintendent to suspend an employee without pay for up to three days was not an unlawful delegation of authority under Florida statutes. A school board can delegate authority "which is not expressly prohibited" by state statute.[125] A Louisiana statute, which provided only that the term of the superintendent shall not exceed four years, was interpreted to mean that a superintendent's four-year contract renewed in May expired in December simultaneously with the end of the term of office of the school board because the superintendent as an employee of the board "should represent the values, policies, and attitudes of the duly elected school board in order to effectively implement the programs of that board."[126] A tenured teacher who had filed for retirement with the New York Teacher's Retirement System had also effectively resigned from his position as occupational guidance counselor and did not have to be reinstated by the school district.[127]

Discussion among school board members in closed session regarding dismissal of a nontenured teacher prior to the termination vote in open session did not disqualify the board members as decision makers under state law as long as the roll call vote took place in the open session.[128] A nontenured teacher hired for a one-year contract expiring on June 30, who was furnished notice of nonrenewal prior to the April 1 cut-off date, could not argue that failure of the school district to hire her in August for another vacant position was in retaliation for an ethics discussion in class, because at the time the school board made its employment decision in August, the

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[122] Matrisciano v. Board of Educ. of Brady School Dist. No. 6, Lincoln County, 459 N.W.2d 230 (Neb. 1990).

[123] Beason v. Rapides Parish School Bd., 558 So. 2d 281 (La. Ct. App. 1990).

[124] Sailer v. Rhame Pub. School Dist. No. 17, 455 N.W.2d 588 (N.D. 1990).

[125] School Bd. of Collier County v. Florida Teaching Profession Nat'l Educ. Ass'n, 559 So. 2d 1197, 1198 (Fla. Ct. App. 1990).

[126] Hayden v. Richland Parish School Bd., 554 So. 2d 164, 169 (La. Ct. App. 1989).

[127] Cannon v. Ulster County Bd. of Coop. Educ'al Servs., 548 N.Y.S.2d 107 (App. Div. 1989).

[128] Verticchio v. Divernon Community Unit School Dist. No. 13, 555 N.E.2d 738 (Ill. App. Ct. 1990).

the teacher was no longer an employee under state law.[129] A school district grounds-keeper who had been terminated was not entitled to notice or hearing prior to termination under a state statute requiring notice and hearing for employees who had served 195 days within one school year where the employee's term included parts of two successive academic years.[130]

However, discretion of school boards is limited and employees prevailed in a significant number of cases. While fact situations of all cases are varied, a common thread is the relationship between contract provisions and statutory requirements or limitations. Alabama's Fair Dismissal Act provision that notification, reasons for termination, and a hearing applied to the three years of a nontenured teacher's probationary status also applied to nonteacher employees employed on a three-month contract.[131] Nonprofessional educational employees working pursuant to three-month contracts were subject to the state's Fair Dismissal Act and could not have their contracts terminated and pay stopped without the school district meeting the Act's requirement of employees' right to draw salaries until charges against them had been proved.[132] A substitute bus driver who failed to take the required physical examination because of his mother's illness and his own hospitalization for hepatitis did not display willful misconduct so as to disqualify the terminated employee from unemployment compensation.[133] A collective bargaining agreement which failed to allow for final and binding arbitration in all instances violated Ohio state statute and therefore bus drivers who had been terminated pursuant to the inadequate agreement were entitled to back pay.[134] Under Illinois statutes, where remediation of teaching defects is required except in certain statutory dismissal offenses, a teacher who had taught agriculture classes for nine years without the required teaching requirements was entitled to remediation. The school district's argument that it might lose state aid for permitting an unqualified teacher to teach was too speculative and did not meet the test of damage to students, faculty, or school to make the teacher's dismissal irremediable.[135] An existing contract teacher could not be denied her due process rights under the state's Term Contract Nonrenewal Act when a school district sought to apply its new probationary policy to that teacher.[136] The head basketball coaching responsibilities of a tenured teacher were included within the definition of "teacher" under the state's continuing contract law entitling him to back pay and reinstatement when the school board removed him without providing notice of nonrenewal required under state law.[137] Under Alabama's Fair Dismissal Act, a school board had to pay a terminated employee until the employee's requested review panel had heard and determined charges against him.[138] A nontenured teacher who had signed a special one-year teaching contract was nonetheless entitled under the school district's Master Agreement to a statement of specific reasons regarding nonrenewal of her contract.[139]

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[129] Sheridan v. Board of Educ. of the Town of Fairfield, 565 A.2d 882 (Conn. Ct. App. 1989).

[130] California School Employees Ass'n, Feather River Chapter No. 342 v. Oroville Union High School Dist., 269 Cal. Rptr. 90 (Ct. App. 1990).

[131] *Ex parte* Clayton, 552 So. 2d 152 (Ala. 1989).

[132] Clayton v. Board of School Comm'rs of Mobile County, 552 So. 2d 145 (Ala. Civ. App. 1989).

[133] Arkle v. Independent School Dist. Number One of Tulsa County, 784 P.2d 91 (Okla. Ct. App. 1989).

[134] Sutton v. Cleveland Bd. of Educ., 726 F. Supp. 657 (N.D. Ohio 1989).

[135] Morris v. Illinois State Bd. of Educ., 555 N.E.2d 725 (Ill. App. Ct. 1990).

[136] Central Educ. Agency v. George West Indep. School Dist., 783 S.W.2d 200 (Tex. 1989).

A number of cases dealt with unique dismissal situations. The state commissioner of education in New York could not increase a hearing panel's recommendation of a teacher penalty of a board reprimand for unbecoming conduct to a one-semester suspension without pay where the commissioner violated administrative precedent by basing his decision on prior warnings to the teacher of misconduct rather than prior disciplinary convictions.[140] A school board, which had accepted the findings of an administrative law judge that the evidentiary record did not support an ultimate fact finding requiring dismissal of a tenured teacher for alleged incompetency, could not under the Colorado Teacher Tenure Act then use the same evidentiary findings to impose a one-year probation on the teacher. Having accepted the law judge's findings regarding dismissal, the school board could not impose probation without again going through the entire administrative review process.[141] A tenured custodian suspended for sale of marijuana was entitled under New Jersey statute to pay from date of suspension until he was indicted.[142] A suspended teacher, ordered reinstated "with all prerequisites and benefits," was entitled to whatever rights she would have received as a teacher on leave of absence, including salary and worker's compensation awards.[143] This case was before the Tennessee Supreme Court for the second time in two years[144] and involved what the court described as "reprehensible treatment of the teacher by the school district."[145]

Cases also involved issues of unemployment compensation, fairness of punishment, and fairness of hearing. A day-care worker discharged after striking a student in violation of her employer's rule against physical punishment was entitled to unemployment compensation because her reflex action in striking the student to prevent being struck a second time did

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137. Reid v. Huron Bd. of Educ., 449 N.W.2d 240 (S.D. 1989).

138. Crenshaw v. Mobile County Bd. of School Comm'rs, 560 So. 2d 1059 (Ala. Civ. App. 1989).

139. Birgenheier v. Trustees, Yellowstone County Dist. No. 2, 791 P.2d 1388 (Mont. 1990).

140. Engel v. Sobel, 556 N.Y.S.2d 179 (App. Div. 1990).

141. Forbes v. Poudre School Dist. R-1, 791 P.2d 675 (Colo. 1990).

142. Slater v. Board of Educ. of Ramapo-Indian Hills Regional High School Dist., 568 A.2d 109 (N.J. Super. Ct. App. Div. 1989).

143. McGhee v. Miller, 785 S.W.2d 817, 819 (Tenn. 1990).

144. *See* McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988). *See* Yearbook of Education Law 1989 at 18.

145. McGhee v. Miller, 785 S.W.2d 817, 819 (Tenn. 1990).

not constitute statutory misconduct.[146] An employee's contract year can be changed through practice to coincide with the employer's fiscal year. An employee hired in September had the annual renewal date of her contract altered through practice to July 1 when the education council awarded her a raise; the effect of the raise was to create a contract for a one-year term entitling the employee to ninety days notice prior to termination.[147] A tenured teacher who had been charged with misconduct and who was entitled to salary payments after he requested adjournment of his hearing was entitled to salary payments for the period between the time the hearing was ordered reconvened and the time of his retirement absent any indication that he was responsible for the delay in reconvening the hearing.[148] A twelve month suspension without pay, the most severe sanction that could be imposed, for three acts of misconduct by a driver with a twenty-year excellent driving record was so disproportionate as to be shocking to one's sense of fairness.[149] A probationary special education teacher, who alleged that the participation of a biased board member with a child in her special education class subverted the purpose of a statutorily-provided "private conference" between the board and the teacher prior to nonrenewal, was entitled to trial as to whether the board member's participation denied the teacher a fair hearing. The school district's immunity from damages did not apply to injunctive relief in the teacher's claim for reinstatement.[150]

One case did not fit clearly in the categories above and reflects the relationship among teachers, school boards, and the press. A newspaper was entitled under Michigan's Freedom of Information Act to a copy of tenure charges of sexual misconduct against and the settlement agreement between the teacher and school district even though the teacher's identity could not be revealed under the Act.[151]

REDUCTION-IN-FORCE and INVOLUNTARY LEAVES of ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and collective bargaining agreements. State reductions will normally be upheld if supported by a rational basis. Thus, a state early retirement statutory arrangement for state employees which had as its primary intent the facilitation of savings in the state revenues by lowering the number of employees on the state payroll stated a rational basis and was therefore not violative of the equal protection clause when it excluded state superintendents since they were on the payroll of local school districts.[152]

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[146] Smith v. Kinder Care Learning Centers, Inc., 389 S.E.2d 30 (N.C. 1990).
[147] Burge v. Western Pa. Higher Educ. Council, Inc., 570 A.2d 536 (Super. Ct. 1990).
[148] Derle v. North Bellmore Union Free School Dist. 551 N.Y.S.2d 49 (App. Div. 1990).
[149] Borkhuis v. Quinn, 551 N.Y.S.2d 82 (App. Div. 1990).
[150] Harkness v. Palmyra-Eagle School Dist., 460 N.W.2d 769 (Wis. Ct. App. 1990).
[151] Booth Newspapers, Inc. v. Kalamazoo School Dist., 450 N.W.2d 286 (Mich. Ct. App. 1989).

Necessity for Reduction-in-force

Two cases in this section reveal that courts scrutinize carefully the necessity for RIF, although they can be flexible in applying appropriate law. The appropriate test in determining whether a school board's decision to RIF employees was arbitrary and capricious in light of a decline in revenues and students, is not whether its decision "was the best under the circumstances" but whether "the record contains relevant evidence that reasonably supports the Board's decision." In this Wyoming case a decision to RIF 5.5 positions was upheld, while under state law there was no requirement to realign teaching duties premised on seniority.[153] Similarly, a RIFed teacher who had failed to file written notice of appeal to the appropriate party within the ten-day statutory period lost his right to a hearing to challenge the seniority list.[154] A tenured teacher's termination, which had not conformed to a statutory requirement that the school board not vote on terminations because of RIF until after a teacher's hearing, was nonetheless upheld because evidence of RIF was clear and the teacher had suffered no harm to his reputation.[155]

Elimination of Position

Cases in this section tend to overlap with the issue of selecting the employees to be retained as discussed under the next section. In the absence of bad faith, fraud, or collusion a maintenance supervisor's civil service position could be abolished in the interest of economy and efficiency as part of a larger reorganization.[156] Reducing a teaching position from full-time to half-time because of declining enrollments did not amount to abolition of the position, but rather maintenance of the position on a part-time basis.[157]

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[152] Haley v. Hall, 733 F. Supp. 1275 (E.D. Ark. 1990).

[153] Palmer v. Board of Trustees of Crook County School Dist. No. 1, 785 P.2d 1160, 1164 (Wyo. 1990).

[154] Greene v. Pateros School Dist., 799 P.2d 276 (Wash. Ct. App. 1990).

[155] Birrer v. Trustees, Wheatland County School Dist. No. 15, 786 P.2d 1161 (Mont. 1990).

[156] Johnson v. Board of Educ. of City of Jamestown, 547 N.Y.S.2d 727 (App. Div. 1989).

Selection of Employees

Cases in this section deal with interpretation of state statutes. A tenured teacher, dismissed because of financial constraints, had been improperly dismissed under state statute where a position she was qualified to fill was occupied by a nontenured teacher at the same school in which she taught.[158] School districts that had entered into an agreement for a cooperative secondary program to be administered by a joint powers board did not have authority to use a joint seniority list to decide which teacher would be placed on unrequested leave of absence, where the teachers of one of the districts had not agreed in their master contract to use of the joint list.[159]

Realignment/Reassignment

Three cases indicate the primary role of state statute in this section. In Minnesota, school districts have a statutory duty to realign teachers placed on unrequested leave of absence because of declining enrollment; furthermore, if a negotiated bargaining agreement is in conflict with the statute by eliminating realignment, the statute prevails.[160] In Pennsylvania, a school board must take note of all certifications of an employee in reassignments but a board does not have to take note of all multiple certifications of all employees in order to retain the most senior employees.[161] In a rather complicated case involving two tenured teachers who had been employed for a number of years and then RIFed from those positions, the West Virginia Supreme Court determined that no seniority accrued in administrative positions for purposes of bumping other administrators, but that in reassigning former administrative personnel to teaching positions, seniority would be based on both teaching and administrative years.[162]

Employees prevailed in most cases with courts tending to protect employees with the greatest amount of seniority. Under Minnesota law, a school district could be required to realign teachers with less seniority in order to accommodate a teacher with more seniority on the unrequested leave of absence list.[163] A tenured teacher RIFed from a full-time P.E.

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[157] Gettinger v. Putnam/Northern Westchester Bd. of Coop. Educ'al Servs., 552 N.Y.S.2d 141 (App. Div. 1990).

[158] Assad v. Berlin-Boylston Regional School Comm., 550 N.E.2d 357 (Mass. 1990).

[159] *In re* Battaglia, 451 N.W.2d 46 (Minn. Ct. App. 1990).

[160] *In Re* Bristol, 451 N.W.2d 883 (Minn. Ct. App. 1990).

[161] Duncan v. Rochester Area School Bd., 571 A.2d 365 (Pa. 1990).

[162] Board of Educ. of County of Harrison v. Bowers, 396 S.E.2d 166 (W. Va. 1990).

[163] Harms v. Independent School Dist. No. 300, LaCrescent, 450 N.W.2d 571 (Minn. 1990).

position had to be re-hired for the half-time teaching position that replaced his former full-time position.[164] A state statute requiring realignment to assure that the more senior faculty are retained in positions for which they are certified did not permit the school board to exercise discretion in rejecting realignment where it considered such an act to be educationally unsound.[165] A high school principal, whose position had been eliminated through a RIF and who was also a tenured teacher, was entitled under state law to bump a nontenured teacher in an area of his teaching certification.[166] A part-time tenured teacher seeking to return to any available full-time teaching position was entitled under Illinois law to assert bumping rights against a new nontenured teacher hired to teach in plaintiff's area.[167]

One case involved nonteaching employees being treated differently from faculty. When school districts took over a cooperative educational services district, certified teaching assistants whose positions had been abolished as a result of the take over were not entitled under state statute to an offer of similar positions in the districts or to be placed on preferred employment eligibility lists because such statutory rights were conferred on teachers, not teaching assistants.[168]

Call-back Rights

Call-back rights tend to be controlled by state statutes. Under the Pennsylvania state Public School Code, a "transfer" of a program or class had not occurred when three math teachers were suspended for declining enrollments, even though the effect was to transfer responsibility for teaching math courses from the vocational-technical school, where the teachers had been employed, to public school districts. Had the court determined that a "transfer" had occurred the plaintiffs would have been entitled to statutory recall rights at the public high schools.[169] School nurses, who had taught in a practical school district nursing program for two consecutive years without receiving notice of dismissal, had acquired statutory tenure and were entitled to recall after the nursing program had been discontinued.[170] In a complex case involving interpretation of Minnesota state statutes and the terms of an inter-district cooperation agreement creating new teaching positions, a teacher, who had been placed on unrequested leave of absence prior to the interdistrict cooperation agreement, was entitled to recall over teachers from the other district because the teacher in the first district had seniority.[171]

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[164] Harris v. Trustees, Cascade County School Dist. No. 6 and F, 786 P.2d 1164 (Mont. 1990).

[165] Dallap v. Sharon City School Dist., 571 A.2d 368 (Pa. 1990).

[166] Holmes v. Board of Trustees of School Dist. Nos. 4, 47 and 2, 792 P.2d 10 (Mont. 1990).

[167] Deem v. Board of Educ. of Triad Community Unit School Dist. No. 2, Madison County, 558 N.E.2d 291 (Ill. App. Ct. 1990).

[168] Anderson v. Cortland City School Dist., 554 N.Y.S.2d 769 (Sup. Ct. 1990).

[169] Hahn v. Marple Newtown School Dist., 571 A.2d 1115 (Pa. Commw. Ct. 1990).

[170] James v. Board of Educ. of School Dist. No. 189, E. St. Louis, 549 N.E.2d 1001 (Ill. App. Ct. 1990).

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employee's contract and differing interpretations of the provisions in that contract tend to foster litigation. One case involved interpretation of a collective bargaining agreement. Four teachers who had resigned their positions between 1966 and 1978 and were rehired between 1981 and 1985 as new teachers on the salary schedule were entitled, under the current collective bargaining agreement, to credit for the prior years of teaching.[172] In an Arkansas case involving interpretation of conflicting contractual provisions, a court determined that coaches were entitled to additional pay for days of coaching beyond 194 days under a school district's extended contract provision in its salary schedule even though they also had received a salary supplement to perform coaching duties.[173]

A general requirement in law is that a person cannot recover compensatory and incidental damages for breach of contract without attempting to mitigate damages. In Arizona, a state appeals court has found that two wrongfully terminated tenured teachers had adequately mitigated damages where one had taken employment at a boarding school at a substantially lower salary and the second had unsuccessfully made fifty-nine job contacts.[174] The remainder of the cases where employees prevailed involved interpretation of employment contracts, most of which also involved state statutes. Under Ohio statutes, teachers who perform extracurricular activities are entitled to additional service contracts and the school board abused its discretion when it offered such a contract to the yearbook advisor, but not to the newspaper advisor.[175] A superintendent who had nominated herself to fill a vacant principal's job after losing a re-election bid as superintendent had not abused her authority under state statute interpretation making matters of controversy within one local school board a "local controversy" requiring exhaustion of administrative remedies.[176] In one case involving contract only, a former instructor in a high school Junior Reserve Army Training Corps was entitled to back wages based on a retroac-

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171. Sherek v. Independent School Dist. No. 699, 449 N.W.2d 434 (Minn. 1990).
172. Centennial School Dist. v. Centennial Educ. Ass'n, 576 A.2d 99 (Pa. Commw. Ct. 1990).
173. Helena-West Helena School Dist. #2 v. Randall, 796 S.W.2d 586 (Ark. Ct. App. 1990).
174. Britt v. Red Mesa Unified School Dist. No. 27, County of Apache, 799 P.2d 9 (Ariz. Ct. App. 1990).
175. Wolf v. Cuyahoga Falls City School Dist. Bd. of Educ., 556 N.E.2d 511 (Ohio 1990).
176. Bacon v. Brewer, 395 S.E.2d 383 (Ga. Ct. App. 1990).

tive Army promotion where his wage formula was dependent on the rank of officers.[177]

One case involved the difficult issue of contract representations and the authority of the person making the statements. An applicant for a junior high teaching position, who had signed a contract with the school district but whose contract was rejected by the school board because of the applicant's difficulties with certification and failure to pass the National Teachers Exam, nonetheless had a triable cause of action for misrepresentation of authority against the school principal who had interviewed him and assured him that the school board would approve the contract. Even though the applicant had no cause of action against the school board, the school principal could be liable in Arkansas under the legal principle that "an agent who contracts in the name of his principal without authority, so that the principal is not bound, may be personally liable to the other contracting party."[178]

Some contract decisions occurred adverse to the employee because the employee failed to act in a timely manner. A teacher on an annual contract who failed to accept the school board's offer of a contract for the following year within the board's two week requirement had not accepted the contract offer in timely fashion and therefore her contract was terminated at the end of the current year.[179] Although a teacher resignation can be withdrawn until accepted or acted upon by a school board, a teacher lost the right to rescind his resignation where the school board had hired a replacement. Filling the teacher's position impliedly accepted the resignation.[180] An employee, who had signed a "Release of Claims" form in consideration for a sum equal to two weeks pay, could not maintain an action for wrongful discharge as a matter of law in Michigan; the tender to refund the money did not occur until more than one year later.[181]

One case involved the circumstances of contract interpretation. A provision in an athletic director's contract which permitted assignment of duties was not adhesive in nature and therefore assignment of two additional classes to the athletic director in a time of financial crisis was warranted under the contract.[182]

School boards generally have discretion in hiring or assigning employees. A high school principal who had been transferred from his principal position to a central office position was not entitled to the principalship as a matter of right when his successor resigned. The principal could not use a *writ of mandamus* to compel the school board to place him back in the principal position where school boards have discretion in hiring and assignments and the principal's claims regarding superior seniority and prior experience were not the only factors to be considered by the school board in its decision.[183] However, in another case, a transfer was held to be arbitrary and unfair where the board's proffered reason for a teacher's transfer pertaining to smaller class size in the new school to which the teacher was transferred had no basis in fact to any problems in the old school.[184]

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[177] Williams v. Orleans Parish School Bd., 560 So. 2d 642 (La. Ct. App. 1990).

[178] Hart v. Bridges, 786 S.W.2d 589, 592 (Ark. Ct. App. 1990).

[179] Petrini v. United States, 19 Ct. Cl. 41 (1989).

[180] Mullen v. Fayettesville-Perry Local School Dist. Bd. of Educ., 557 N.E.2d 1235 (Ohio Ct. App. 1988).

[181] Stefanac v. Cranbrook Educ'al Community, 458 N.W.2d 56 (Mich. 1990).

[182] Trevino v. Board of Trustees of W. Oso Indep. School Dist., 783 S.W.2d 806 (Tex. Ct. App. 1990).

Administrative Regulations and Statutory Provisions

Cases under this section concerned application of state regulations or statutes and tended to be resolved in favor of employees. Assignment of guidance counselors and a librarian by a board of education to substitute for absent classroom teachers was not an emergency measure under a state statute permitting the superintendent of schools to act in case of emergency as the best interests of the school demand where there was no showing that the school district was not able to afford hiring substitute teachers.[185] A tenured teacher selected to serve on the California Commission on Teacher Credentialing was entitled to leave without loss of compensation under a state statute where an employee serves on certain commissions or boards "whose purposes and activities are to further public education."[186] In a contract salary dispute involving both a State Board of Education schedule of minimum salaries and a local board of education salary scale, the Georgia Appeals Court determined that salaries which exceed the state minimum are not in themselves correct where the local school board has not credited teachers with all of the experience to which they are entitled under the local salary scale.[187] In an unusual case involving incorrect advertising of a position, the West Virginia Supreme Court has held that under its statutes an athletic trainer is an extracurricular function and therefore a job position advertisement for "physical education teacher and athletic trainer" represented an improper joinder. This case arose because a rejected applicant was willing to teach physical education but not serve as athletic trainer.[188]

Several cases involved teacher funds as property interests as affected by divorce or bankruptcy. The Montana Supreme Court determined that a deceased teacher's retirement account was a marital asset, part of which could be awarded to a former wife even though a named beneficiary of the account was already receiving monthly benefits.[189] A school teacher's pension was marital property which was subject to attachment under state law in connection with division of property in divorce and ERISA did not apply to prevent such attachment.[190] Under Missouri law, the pension funds paid into the state's Public School Retirement System for a teacher who had filed a Chapter 7 petition in bankruptcy were entirely exempt from his bankruptcy estate.[191] Similarly in Minnesota, funds contributed by a bankrupt teacher under Minnesota's Teachers Retirement Fund are exempt from execution by creditors.[192]

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[183] Tenney v. Board of Educ. of the County of Barbour, 398 S.E.2d 114 (W. Va. 1990).

[184] Alabama State Tenure Comm'n v. Dallas County Bd. of Educ., 569 So. 2d 742 (Ala. Civ. Ct. App. 1990).

[185] Randolph County Bd. of Educ. v. Scalia, 387 S.E.2d 524 (W. Va. 1989).

[186] Wiman v. Vallejo City Unified School Dist., 271 Cal. Rptr. 142, 143 (Ct. App. 1990).

[187] Muscogee County Bd. of Educ. v. Boisvert, 396 S.E.2d 303 (Ga. Ct. App. 1990).

[188] Cruciotti v. McNeel, 396 S.E.2d 191 (W. Va. 1990).

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states. Some states permit teacher or administrator tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice-versa. Tenure transfer from one district in a state to another is controlled by state law.

Tenure Status

Tenure status usually hinges on application of state law to difficult factual situations. A teacher's first fourteen month appointment to a state school had to be counted under state law toward the three-year probationary period for tenure even though she was not an employee for the entire probationary period of a school district.[193] A teacher who had taught one year in a Department of Health and Human Services (DHHS) school and then three years as a probationary teacher could not add the one DHHS year to create tenure for herself because the DHHS school did not require teachers to be certified.[194] In a case of procedural note, a four month statute of limitations in New York to challenge a principal's revocation of his principal license and reversion to his assistant principal license did not begin to run until he had received official notice of reversion and thus his lawsuit had been timely filed.[195]

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[189] *In re* Marriage of Butler, 795 P.2d 467 (Mont. 1990).
[190] Graham v. Graham, 578 A.2d 459 (Pa. Super. Ct. 1990).
[191] *In re* Olson, 108 B.R. 232 (W.D. Mo. 1989).
[192] *In re* McKeag, 111 B.R. 815 (D. Minn. 1990).
[193] Perkins v. State Bd. of Elementary and Secondary Educ., 562 So. 2d 930 (La. Ct. App. 1990).
[194] Perkins v. State Bd. of Elementary and Secondary Educ., 552 So. 2d 735 (La. Ct. App. 1989).

Tenure by Default or Acquiescence

A teacher may seek to secure tenure by taking advantage of a school district's error or oversight. Under Kentucky law a teacher who had served three years under half-time contracts, but who actually ended up during each year teaching full-time, was entitled upon issuance of the fourth year half-time contract to tenure. Failure of the school district to give written notification of nonrenewal prior to issuance of the fourth year contract entitled the teacher to tenure.[196]

CERTIFICATION

Certification can refer to rules or regulations, the actual certificate as indicia of one's professional status, or the process by which one secures such a certificate. In a divorce case, a teaching certificate was held to have no separate asset value for purposes of distribution pursuant to a divorce proceeding where the license was considered to have merged into a fifteen-year teaching career and that career had proceeded to a point where it had produced assets capable of valuation.[197]

Certification Standards

Professional certificates are usually granted as the result of examination or completion of academic requirements. Failure of the examination or failure to maintain one's professional qualifications may adversely affect certification status. A newly hired teacher who failed to provide by the opening day of school a certificate showing he had passed the Texas Examination of Current Administrators and Teachers (TECAT) did not have an action for breach of contract when his position was filled even though he passed the TECAT after school was in session for six weeks and he sought to get his position back.[198] However, a black elementary teacher who had been nonrenewed during a school consolidation because she had failed the Alabama State Department's test required to receive teacher certification was entitled to reinstatement, back pay, and attorney fees as a result of a consent decree that the test had a discriminatory impact. The state department's certification test fell "so far below acceptable and reasonable standards that the test could not be reasonably understood to do what it purport[ed] to do."[199]

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[195] Orellanes v. Board of Educ., 561 N.Y.S.2d 242 (App. Div. 1990).

[196] Board of Educ. of Harrodsburg v. Powell, 792 S.W.2d 376 (Kent. Ct. App. 1990).

[197] Parlow v. Parlow, 548 N.Y.S.2d 373 (Sup. Ct. 1989).

[198] Grand Prairie Indep. School Dist. v. Vaughan, 792 S.W.2d 944 (Tex. 1990).

The state may have discretion in refusing a certificate. A state Director of Revenue's decision to refuse issuance of a school bus permit to an applicant convicted of wife and child abandonment and nonsupport was upheld as within the statutory prohibition of permit issuance to persons convicted of "an offense against the family . . . or of any similar crime."[200]

Local school boards may or may not have discretion in hiring noncertificated employees or employees certificated in areas other than the open position. Although county school boards in West Virginia have substantial discretion in matters related to hiring, a school board abused its discretion by hiring a teacher certified only in areas of general science and mathematics to fill a gifted education opening instead of a second candidate who was specifically qualified by the state to teach gifted education.[201] However, the Wisconsin Court of Appeals upheld the use of instructors in a vocational-technical adult education school who did not have State Department of Public Instruction certification for the reason that a rational basis existed for treating vocational adult education teachers, who also teach public school students, differently from other public school teachers.[202]

Decertification, Revocation, or Suspension

Certification agencies have broad, although not unlimited, discretion in penalizing persons holding certificates. A teacher discharged from his position as a sixth grade teacher because of improper sexual contact with female students was a person "charged with gross neglect of duty" under Teacher Standards and Practices Commissions' rules justifying denial of reinstatement of his teaching certificate.[203] In upholding the revocation of a teacher's license to teach by the State Board of Education, the New Hampshire Supreme Court approved, under the doctrine of *collateral estoppel*, the State Board of Education's reliance upon the prior findings of fact made by the Canadian Province of New Brunswick which had the previous year revoked the teacher's credentials for lack of good moral character.[204] In a teacher revocation hearing, the transcript of a former student's trial testimony describing rape could be used to provide evidence of the teacher's immorality and misconduct in office even though the conviction for rape had been reversed on grounds that an expert witness for the state had invaded the province of the jury by stating that the victim was credible and reliable.[205]

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[199] Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 825 (M.D. Ala. 1989).

[200] Callier v. Director of Revenue, State of Mo., 780 S.W.2d 639 (Mo. 1989).

[201] Johnson v. Cassell, 387 S.E.2d 553 (W. Va. 1989).

[202] Green Bay Educ. Ass'n v. State Dep't of Pub. Instruction, 453 N.W.2d 915 (Wis. Ct. App. 1990).

[203] Reguero v. Teacher Standards and Practices Comm'n, 789 P.2d 11 (Or. Ct. App. 1990).

[204] Petition of Breau, 565 A.2d 1044 (N.H. 1989).

However, attempts to adversely affect employees' certification have been rejected for a variety of legal reasons. A teacher's teaching certificate had been improperly revoked where the state board of education had used evidence underlying criminal drug charges against the teacher, charges which were ultimately dismissed and expunged.[206] The Superintendent of Education in Illinois did not have authority to revoke a teacher's certificate after the Teacher Certification Board had voted that the teacher's certificate would not be revoked.[207] In a case testing the state's burden of proof in recalling a bus driver's license, a state court in Pennsylvania determined that a state regulation disqualifying drivers with seizure disorders meant that the Department of Transportation was required to prove that the driver's "seizure disorder was likely to cause loss or impairment of consciousness or an inability to safely drive a school bus."[208] A teacher holding a state teaching certificate which was automatically revoked pursuant to state regulation requiring invalidation of a certificate if a testing company invalidates a test score was deprived of liberty and property interests, as well as procedural due process rights to notice and to a hearing.[209] In a different vein, a teacher who was discharged as a result of failing a certification exam which was required to continue teaching, did not leave employment voluntarily and was not discharged as result of misconduct, and thus was eligible for unemployment compensation.[210]

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[205] Ulrich v. Indiana, 555 N.E.2d 172 (Ind. Ct. App. 1990).

[206] Ambus v. Utah State Bd. of Educ., 800 P.2d 811 (Utah 1990).

[207] Hunt v. Sanders, 554 N.E.2d 285 (Ill. App. Ct. 1990).

[208] Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989).

[209] Brown v. South Carolina State Bd. of Educ., 391 S.E.2d 866 (S.C. 1990).

[210] Gulf County School Bd. v. Washington, 567 So. 2d 420 (Fla. 1990).

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BARGAINING

Charles J. Russo

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INTRODUCTION

The number of reported cases dealing with collective bargaining increased for the second consecutive year. While there was a significant amount of litigation, including one Supreme Court case, no new trends or developments appear to be looming on the horizon. Rather, the courts relied on established precedents in deciding the many different issues confronting them. This chapter presents cases involving K-12 settings; cases relating to higher education are reviewed in Chapter 8.

CONSTITUTIONAL ISSUES

Six of the eight cases dealing at least in part with constitutional issues addressed the closely related questions of fair share fees, representation fees, and agency fees. The two remaining cases concerned the rights of public school teachers to participate in union activities.

In a federal case dealing with fair share fees, the Sixth Circuit relied on the Supreme Court's ruling in *Chicago Teachers Union, Local No. 1 v. Hudson*[1] and its own precedent[2] to uphold fair share fee arrangements.[3] It found that these cases established the constitutional requirements related to a union's collection of agency fees and could be applied retroactively to fair share fee collections under an agency fee collection plan in a collective bargaining agreement. The court also ruled that a nonmember's failure to object to this provision did not preclude relief, but it limited recovery to only the nonchargeable portion of the unconstitutionally collected fees.

In a lengthy and complex case brought by nonunion members challenging fair share fees, an Illinois court ruled that the union had provided adequate information to those individuals who were considering whether to object to the fees.[4] In upholding the collection of fees, the court found that the state Educational Labor Relations Board had properly determined the percentage of fees attributable to union activities unrelated to collective bargaining. It also ruled that the amount deducted after nonmembers' objections were heard was not excessive and was adequately supported by the best information available to the union at that time.

The EEOC filed suit in federal district court in Ohio on behalf of two teachers who alleged religious discrimination against a union in connection with its collection of representation fees. The teachers claimed that the union did not allow them to be excused from the collective bargaining agreement and refused to forward their fees to a charity of their choice. In granting the union's request for summary judgment, the court concluded that the teachers failed to establish a *prima facie* case of religious discrimination since they had not been discharged, had not been threatened with discharge, and had not suffered the loss of any privileges in connection with their employment.[5]

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[1] 475 U.S. 292 (1986). *See* The Yearbook of Education Law 1987 at 46 for a full discussion of this case.

[2] Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).

[3] Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir. 1990).

[4] Antry v. Illinois Educ. Labor Relations Bd., 552 N.E.2d 313 (Ill. App. Ct. 1990).

In a representation fees case in New Jersey, teachers who were not union members in their districts filed petitions challenging the amount of representation fees they paid and the procedures used in their collection. The court affirmed the decision of the state Public Employment Relations Commission.[6] It held that the union's tender of the full amount of the disputed fees plus interest rendered the challenge moot since it afforded the maximum possible relief continuing litigation could have provided.

Two federal suits challenged the constitutionality of agency fees. In the first case the Ninth Circuit upheld the constitutionality of agency fees under *Hudson*.[7] It also relied on *Hudson* and persuasive precedent from the Sixth Circuit[8] to require the teachers' association to reduce its agency fees by the amount spent for nonrepresentational expenses prior to collection of the fees. Additionally, the court ordered the association to provide notice and adequate information about agency shop fees to all nonmembers before any fees could be deducted from their paychecks.[9]

A second federal case granted class status to nonunion teachers who challenged the procedural scheme used by a teachers' union in determining and collecting agency fees.[10] The court also ruled that the union could not deduct full union dues from all nonunion teachers who did not file objections since a significant portion of the amount collected was spent on ideological and not representational activities.

The two remaining cases in this section concern the rights of teachers to participate in union activities. The Tenth Circuit reaffirmed the principle that the first amendment protects the right of public employees who seek to join and participate in union activities.[11] It also reaffirmed the prohibition of retaliation against individuals who file grievances with a union. Accordingly, school officials were denied qualified immunity with respect to their claim that they retaliated against teachers for associating with a union other than the exclusive bargaining agent in the district.

A discharged tenured teacher in Illinois successfully brought suit against the board of education for reinstatement and damages, claiming that he was terminated in retaliation for his union organizing activities. The court affirmed the teacher's reinstatement, reasoning that the reason for the board's action was retaliation over the teacher's attempt at exercising his constitutionally protected right.[12] It also found that the board's claim of economic necessity as the basis for his dismissal was unsubstantiated.

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[5] EEOC v. Patrick Henry Educ. Ass'n, 741 F. Supp. 670 (N.D. Ohio. 1990).
[6] Daly v. High Bridge Teachers' Ass'n, 575 A.2d 1373 (N.J. Super. Ct. App. Div. 1990).
[7] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).
[8] Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).
[9] Grunwald v. San Bernardino City School Dist., 917 F.2d 1223 (9th Cir. 1990).
[10] Mitchell v. Los Angeles Unified School Dist., 744 F. Supp 938 (C.D. Cal. 1990).
[11] Morfin v. Albuquerque Pub. Schools, 906 F.2d 1434 (10th Cir. 1990).

RECOGNITION and REPRESENTATIONAL ISSUES

Supervisory, Managerial, and Confidential Employees

In the only case in this subsection, an Oregon court ruled that the state Employment Relations Board was required to hold a unit determination hearing after an incumbent union objected to the proposed unit description offered by a challenger union.[13] The new description was limited to classified school employees excluding supervisory, confidential, temporary, substitute, and limited-term employees and would have excluded a significant number of part-time employees eligible under the incumbent union's description. However, the court found that the Board acted within its discretion in refusing to set a hearing on the incumbent union's request for a contested case hearing over disputed votes as there was no basis for finding that the votes challenged and not counted were cast by eligible employees.

Elections

There are three cases in this subsection. The first two deal with challenges to representation elections; the third addresses the rights of teachers to petition for such an election.

The Illinois Educational Labor Relations Board (ELRB) set aside the results of a closely contested representation election for improper conduct after it was challenged by the defeated union. On appeal, the court affirmed the ELRB's findings of fact and conclusions of law that the closing of the polls for a fifteen minute break was improper where the election was decided by only two votes out of the more than 800 votes cast, that at least one employee was denied the opportunity to vote because of the break, and that more than fifty eligible voters had not cast their votes.[14]

The Supreme Court of Minnesota reinstated a ruling by the Commissioner of the Bureau of Mediation Services voiding a representation election.[15] It ruled that the Commissioner had the implied power to invalidate the election where there was substantial likelihood that the deficiency in the voting procedures, namely a lack of instructions on how to obtain substitute ballots, adversely affected the election results.

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[12] Temple v. Board of Educ. of School Dist. No. 94, 548 N.E.2d 640 (Ill. App. Ct. 1989).

[13] Oregon Ass'n of Classified Employees v. Eagle Point School Dist. No. 9, 782 P.2d 432 (Or. Ct. App. 1989).

[14] Decatur Fed'n of Teachers v. Educational Labor Relations Bd., 556 N.E.2d 780 (Ill. App. Ct. 1990).

The final case in this subsection concerns the dismissal of a petition for an election to certify a bargaining representative for adult education teachers in a school district. The Michigan Court of Appeals upheld the State Employment Relations Commission's dismissal of the petition.[16] It reasoned that since the teachers were employees of a consortium of two districts organized to provide an adult education program on a cooperative basis, they were not employees of either constituent district even though each of the teachers taught in only one school district.

RIGHTS and OBLIGATIONS of EXCLUSIVE BARGAINING REPRESENTATIVES

There are seven cases in this section. The first three deal with a union's right to collect dues while a fourth addresses the right of a union to act in its capacity as the exclusive bargaining representative of its members. The last three cases concern a union's duty of fair representation.

Union Rights

A Kentucky court ruled that a school board had a statutory duty to honor union members' requests for payroll deduction of their dues.[17] However, it also held that the union was not entitled to recover damages in the amount of back dues since the board's failure to allow the payroll deduction did not relieve the union members of their obligation to pay dues.

Where a local school board intended to seek reauthorization from teachers before deducting union dues from their salaries, a Louisiana teachers' association filed a motion for summary judgment. The court granted a preliminary injunction directing the board to implement a voluntary payroll deduction plan under which the union could collect dues.[18] It also dismissed the school board's appeal for mootness since the board had voluntarily implemented the payroll deduction plan.

The Supreme Court of New Hampshire was asked to rule in a controversy over the collection of union dues where a local teachers' union changed its affiliation from one labor organization to another. It held that the local union was entitled to have dues collected by the school district prior to the date that it changed its labor affiliation.[19]

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[15] *In re* Investigation of Unfair Election Practices Objections, 461 N.W.2d 215 (Minn. 1990).

[16] *In re* Grand Haven Pub. Schools, 454 N.W.2d 116 (Mich. Ct. App. 1990).

[17] Clevinger v. Board of Educ. of Pike County, 789 S.W.2d 5 (Ky. 1990).

[18] Davis v. Terrebonne Parish School Bd., 563 So. 2d 1278 (La. Ct. App. 1990).

A teachers' union negotiated a settlement over a class size proposal that resulted in the loss of jobs by several of its members rather than continue court action to enforce an arbitrator's award on its behalf. Subsequently, one of the teachers who lost her job had her motion to intervene denied. An appellate court in Massachusetts affirmed this denial.[20] It reasoned that the union, in its capacity as the exclusive representative of the bargaining unit, acted properly as it alone had the right to bring suit to enforce the agreement, and that an individual member was not entitled to intervene. It pointed out that while the union could not be unmindful of its duty to fairly represent the interests of individual members, it accepted a compromise in this dispute since it was in a tenuous position and because it had a responsibility to secure a settlement that would be advantageous to the largest part of its membership. Moreover, it suggested that the teacher had other avenues of recourse available if she wished to pursue her allegation that the union breached its duty of fair representation.

Obligations of Exclusive Representatives

A school employee who was demoted brought an action against her union for a breach of its duty of fair representation based on allegations that it failed to assist her in her efforts to seek reinstatement. The Supreme Judicial Court of Massachusetts reversed a ruling of summary judgment in favor of the union.[21] It ordered the case to trial when it found that issues of material fact as to whether her claims were meritorious precluded summary judgment for either side.

A former school secretary in New York brought an action for monetary damages against her union for an alleged breach of its duty of fair representation. An appeals court upheld this dismissal.[22] It ruled that recovery was barred by the doctrine of *res judicata* since the merits of her underlying grievance against the union had been fully litigated and resulted in a ruling against her.

In a second New York case, a dismissed probationary teacher brought suit against her union alleging a breach of its duty of fair representation. A trial court found that because her dismissal was supported by evidence of

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19. Appeal of Hinsdale Fed'n of Teachers, 575 A.2d 1316 (N.H. 1990).
20. Peabody Fed'n of Teachers, Local 1289 v. School Comm. of Peabody, 551 N.E.2d 1207 (Mass. App. Ct. 1990).
21. Graham v. Quincy Food Serv. Employees Ass'n, 555 N.E.2d 543 (Mass. 1990).
22. Botkin v. United Fed'n of Teachers, 561 N.Y.S.2d 730 (App. Div. 1990).

her unsatisfactory performance, the union did not breach its duty. An appellate court affirmed.[23] It further reasoned that since the union had investigated her claim and exercised its independent judgment not to pursue it in light of a state commissioner's investigation which found her claim to be without merit, the union did not breach its duty of fair representation.

SCOPE of BARGAINING

This section includes ten cases primarily concerned with the scope of bargaining. Four cases dealt with mandatory topics, four involved permissive topics, and two addressed prohibited topics of bargaining.

Mandatory Topics of Bargaining

The only United States Supreme Court case in 1990 dealing with collective bargaining involved a controversy over mandatory topics of bargaining. In affirming a decision of the Eleventh Circuit[24] and the Federal Labor Relations Authority, the Court ruled that the United States Army is required to bargain with the labor union representing elementary school teachers who provide a public education to the children of military personnel.[25] More specifically, the Court held that the Army was required to bargain over such topics as proposals relating to mileage reimbursement, various types of paid leave, and a salary increase.

A bus drivers' union in Pennsylvania filed an unfair labor practice claim, alleging that the district's attempted unilateral implementation of work rules violated the collective bargaining agreement. In affirming a lower court ruling and a determination by the state Labor Relations Board, the court held that rules relating to such matters as absences from work, insubordination, and violations of safety rules impacted on working conditions and were subject to mandatory bargaining.[26] However, it also found that rules dealing with such topics as falsification of district records, removal of district property without authorization, or willful damage of district property were inherent managerial prerogatives and not subject to bargaining.

An educational association in Illinois sought review of a determination by the state ELRB that the school district acted within the scope of its authority when it reduced the number of teachers it employed for economic reasons without first submitting the matter to bargaining. In reversing the ELRB's decision,[27] an appellate court held that the lay off was subject to mandatory bargaining. It reasoned that decisions affecting terms and conditions of employment, particularly where the economic burden to the district had not been established beyond mere inconvenience and speculation, are properly subject to mandatory bargaining.

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[23] Gordon v. Board of Educ., City of N.Y., 562 N.Y.S.2d 180 (App. Div. 1990).

[24] Fort Stewart Schools v. Federal Labor Relations Auth., 860 F.2d 396 (11th Cir. 1988). *See* The Yearbook of Education Law 1989 at 39 for a full discussion of this case.

[25] Fort Stewart Schools v. Federal Labor Relations Auth., 110 S. Ct. 2043 (1990).

[26] Abington Transp. Ass'n v. Pennsylvania Labor Relations Bd., 570 A.2d 108 (Pa. Commw. Ct. 1990).

The New York Court of Appeals was asked to determine whether public interest in detecting and deterring official corruption prohibited bargaining over employee disclosure requirements imposed on high ranking officials by the New York City Board of Education. The court disagreed with a lower court's ruling that public policy bars all negotiation on the subject.[28] In so doing, it reinstated a decision of the Public Employment Relations Board (PERB) and concluded that since the negotiation of disclosure requirements would not amount to an impermissible restriction of the Board's responsibility, they are subject to mandatory bargaining.[29]

Permissive Topics of Bargaining

When the Illinois ELRB determined that a local school district violated state law by failing to bargain over the content of a teacher evaluation plan, the district appealed. An appellate court reversed and held that the substantive criteria for the teacher evaluation plan, including who conducts the evaluation, were subject to permissive, not mandatory, bargaining.[30] It also ruled that the mechanical procedures involved in the evaluation process and the remediation plan pursuant to it were subject to mandatory bargaining.

Similarly, the Supreme Court of Kansas was asked to rule on the bargaining status of teacher evaluation criteria and procedures. In affirming a trial court's judgment, it found that the evaluation criteria, which the local school board was statutorily required to adopt, were not subject to mandatory bargaining.[31] Thus, it held that the district did not commit a prohibited practice by refusing to bargain over the criteria and that the evaluation procedures themselves were subject to mandatory negotiations.

The New York Court of Appeals addressed two cases dealing with whether specific topics were subject to mandatory or permissive bargaining. In the first case, a teachers' union appealed a lower court's ruling that a school board's decision not to apply for funds under the state's Excellence in Teaching Apportionment Program (EIT) was not subject to mandatory bargaining.[32] The program was enacted by the state legislature to provide funds to improve teachers' salaries, but the district decided against taking part in EIT because it would have been required to make additional expenditures for social security and fringe benefits. The judgment of the lower court was affirmed as the court of appeals concluded that a school district's decision whether to participate in EIT was one that the legislature intended should be left to the discretion of the local board.[33]

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[27] Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 557 N.E.2d 418 (Ill. App. Ct. 1990).

[28] Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 542 N.Y.S.2d 53 (App. Div. 1989). *See* The Yearbook of Education Law 1990 at 47 for a full discussion of this case.

[29] Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 555 N.Y.S.2d 659 (N.Y. 1990).

[30] Board of Educ. LeRoy Community Unit School Dist. No. 2 v. Illinois Educ. Labor Relations Bd., 556 N.E.2d 857 (Ill. App. Ct. 1990).

[31] Board of Educ., U.S.D. No. 352 Goodland v. NEA-Goodland, 785 P.2d 993 (Kan. 1990).

In the second case, the court was asked to decide on the bargaining status of a school district's decision to participate in an academic summer school program sponsored by the Board of Cooperative Educational Services (BOCES) rather than conduct its own program using teachers from the district. The teachers' union argued that this was a mandatory subject of negotiation while the district contended that it was permissive or prohibited. The court of appeals reversed a lower court's judgment which held that this was a mandatory subject of bargaining. It reasoned that since the statutory scheme authorizing BOCES specifically addressed the issue of job protection for teachers, the legislature clearly intended to withdraw a local board's decision to contract for a BOCES program from the mandatory bargaining process, thereby rendering it a permissive topic.[34]

Prohibited Topics of Bargaining

In the first of two cases dealing with prohibited subjects of collective bargaining, a local school board challenged an arbitrator's decision to reinstate two special education teachers to their previous positions after the board changed the complement of special education students to be instructed by the teachers. The New York State Court of Appeals affirmed a lower court's judgment and found that the arbitrator had exceeded his authority.[35] The court ruled that as a matter of public policy the school board and teachers' union were statutorily prohibited from bargaining over topics such as teacher qualifications and assignments since these were subject to the exclusive discretion of the school board.

In the final case in this section, the Supreme Court of Oklahoma was asked to decide whether a binding grievance arbitration provision in a collective bargaining agreement impermissibly delegated the board's authority to reprimand a teacher. After the trial court issued a *writ of mandamus* to compel the board's compliance with the arbitration provision, the board appealed. In reversing the judgment of the trial court, the court ruled that since the power to admonish, suspend, dismiss, or reemploy a teacher is vested in a school board as a matter of state law, a board's abdication of these responsibilities is repugnant to the statutory policy implicit in the law.[36] Thus, it held that a school board's authority to discipline a teacher is nondelegable and not bargainable.

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[32] City School Dist. of Elmira v. State Pub. Employment Relations Bd., 536 N.Y.S.2d 214 (App. Div. 1988). *See* The Yearbook of Education Law 1989 at 40 for a full discussion of this case.

[33] City School Dist. of Elmira v. State Pub. Employment Relations Bd., 547 N.Y.S.2d 820 (1989).

[34] Webster Cent. School Dist. v. Public Employment Relations Bd., 555 N.Y.S.2d 245 (1990).

[35] *In re* Board of Educ. of Arlington Cent. School Dist., 557 N.Y.S.2d 661 (App. Div. 1990).

GRIEVABILITY and ARBITRABILITY

Cases are discussed under "Presumption and Arbitrability" where the courts considered whether the underlying dispute was within the scope of the collective bargaining agreement or where they interpreted public policy as it relates to arbitration. Decisions are presented under "Who Determines" rather than "Judicial Review" where, regardless of the underlying dispute, the courts addressed the jurisdictional question of the appropriate forum within which the dispute should be resolved. Cases presented under "Procedural Issues" and "Managerial Prerogatives as a Bar" speak for themselves.

Presumption and Arbitrability

All but one of the ten cases in this subsection support the general judicial presumption favoring arbitration in disputes over the meaning of collective bargaining agreements.

The first four cases are examples of New York's strong presumption in favor of arbitration. In another suit dealing with the Excellence in Teaching Program, the court of appeals was asked to determine how funds available under the program were to be distributed. The teachers' association sought arbitration, but the school board received a stay based on its contention that the funds were not subject to the substantive provisions of the bargaining agreement. The court reversed the stay, ruling that where there is a dispute as to the coverage of the substantive provisions of a contract, it is properly subject to arbitration.[37]

In the second case, the court of appeals did not address the facts of the underlying dispute. It ruled that even where an arbitrator was required to examine an entire bargaining agreement rather than a specific section, the plaintiff was not barred from the arbitration process.[38] It reasoned that whether the employee who was the subject of the dispute was covered by the collective bargaining agreement was a matter of contractual interpretation and therefore was properly subject to arbitration.

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[36] Raines v. Independent School Dist. No. 6 of Craig County, 796 P.2d 303 (Okla. 1990).

[37] Board of Educ., Watertown City School Dist. v. Watertown Educ. Ass'n, 549 N.Y.S.2d 652 (1990).

[38] *In re* Sachem Cent. School Dist., 549 N.Y.S.2d 75 (App. Div. 1989).

Another New York case involved a dispute over a school district's attempt to assign a custodial worker to bus duty. After the aggrieved employee completed the fourth of five steps under the operative provisions of the arbitration clause, the district unsuccessfully sought to stay a move to the final step. In affirming the denial of the stay, an intermediate appellate court pointed out that since public policy was not offended by arbitration over the scope of an employee's work duties, it was the appropriate means to resolve the dispute.[39]

After a probationary teacher was denied tenure, she requested that her teaching association submit to arbitration a grievance alleging a violation of the procedural evaluation provisions of the district's collective bargaining agreement. When the association's application for a stay was denied, it appealed. In affirming the lower court's decision, a New York appellate court ruled that in the absence of either strong public policy prohibitions or language in the bargaining agreement excluding a matter from arbitration, grievance matters must be referred to arbitration.[40] Therefore it held that since arbitration was neither prohibited as a matter of public policy nor explicitly excluded under the terms of the contract, this dispute was to be referred to an arbitrator.

An arbitrator in Pennsylvania determined that a school violated its collective bargaining agreement when it unilaterally attempted to change its sabbatical leave policy. A trial court reversed in favor of the school and the teachers' association appealed. In reinstating the arbitrator's decision, an appellate court pointed out that state labor policy not only favored arbitration, but mandated that employee grievances arising out of the interpretation of a collective bargaining agreement had to be submitted to arbitration. Consequently, the court refused to question the arbitrator's discretion.[41]

When a school district chose not to rehire a teacher because of its serious concerns about her attendance record, she enlisted the assistance of her teachers' association to seek review of the board's decision through the grievance procedure of the collective bargaining agreement. The Public Employee Labor Relations Board decided that the teacher had a grievable issue subject to arbitration, and the district appealed. The ruling of the New Hampshire Supreme Court reflected a presumption in favor of arbitration.[42] The court stated that it would not set aside a Board order unless the arbitration clause in the bargaining agreement was not susceptible to a reading that would cover the dispute. The court then upheld the Board's decision and noted that the only issue the Board considered was whether the parties were required to proceed to arbitration.

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[39] Copaigue Union Free School Dist. v. Local 852, Civil Serv. Employees Ass'n, 556 N.Y.S.2d 725 (App. Div. 1990).

[40] *In re* Clarkstown Cent. School Dist., 558 N.Y.S.2d 704 (App. Div. 1990).

[41] York County Area Vocational-Technical Educ. Ass'n v. York County Area Vocational-Technical School, 570 A.2d 105 (Pa. Commw. Ct. 1990).

[42] Appeal of City of Nashua, School Dist. No. 42, 571 A.2d 902 (N.H. 1990).

A union representing cooks formerly employed by a school district sought binding arbitration over the district's decision to subcontract out its food services operations. After a trial court denied the union's motion to compel arbitration, the Minnesota Court of Appeals reversed. It ruled that this dispute was subject to arbitration in so far as it was reasonably debatable whether the board's decision to subcontract fell within the scope of the arbitration clause of the bargaining agreement in effect between the parties.[43]

A second Minnesota case was the only reported decision not favoring arbitration. Here six of eight probationary teachers whose contracts were not renewed were placed on unrequested leaves of absence. One of two remaining teachers appealed a lower court's order which denied her motion to compel arbitration over her purported right to be placed on leave. In affirming the denial, an appellate court reasoned that since neither the general language of the agreement nor the specific arbitration clause in the applicable bargaining agreement expressed an intent to arbitrate such a dispute, there was no presumption in favor of arbitration.[44]

A school district in Illinois brought an unfair labor relations charge against its teachers' association due to its attempt to seek arbitration over a part-time teacher's grievance seeking full-time status. The ELRB dismissed the district's complaint on the grounds that the collective bargaining agreement in effect between the parties did not exclude the subject of the grievance from arbitration. When the school district sought further review, an appellate court agreed with the ELRB that the initial decision over whether the matter was arbitrable was for the ELRB and not the arbitrator.[45] Moreover, it affirmed the ELRB's finding that since the collective bargaining agreement did not expressly exclude any subject matter from arbitration, the association acted properly when it sought to bring the dispute to arbitration.

In a Michigan case an arbitrator determined that a school board was required to pay a part-time teacher's additional child care expenses due to a change in her teaching schedule. After a trial court reversed in favor of the board, an appellate court reinstated the arbitration award. It reasoned that since the arbitrator's decision was drawn from the language of the contract, which required the board to enforce its rules and policies equitably, he did not exceed his authority.[46]

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[43] School Serv. Employees Local Union No. 284 v. Independent School Dist. No. 88, 459 N.W.2d 336 (Minn. Ct. App. 1990).

[44] Columbia Heights Fed'n of Teachers Local 710 v. Independent School Dist. No. 13, Columbia Heights, 457 N.W.2d 775 (Minn. Ct. App. 1990).

[45] Staunton Community Unit School Dist. No. 6 v. Illinois Educ'al Labor Relations Bd., 558 N.E.2d 751 (Ill. App. Ct. 1990).

Who Determines

This subsection contains eight cases. In the first case three teachers filed suit alleging that their school district failed to provide them with a duty free lunch period as required by state law. After also claiming that a number of teachers in the district were similarly deprived of their rights, they were granted class status. The school district successfully motioned for dismissal on the ground that the ELRB had exclusive jurisdiction over the matter. In its reversal, an Illinois appellate court found that the ELRB lacked jurisdiction to hear the teachers' complaint as it was not covered by the provisions of the collective bargaining agreement.[47] Therefore, the court ruled that this dispute fell within the jurisdiction of the trial court and not the ELRB.

A teacher who had been employed by her district for thirteen years resigned but returned to work a year later. Subsequent to her return, she followed the procedures set forth in the collective bargaining agreement with the district and filed a grievance seeking to compel the school board to place her at the highest salary step and to provide back pay for the periods during which she was improperly classified. The board rejected her demand and her request for a *writ of mandate* ordering the board to act was denied on the ground that she failed to exhaust administrative remedies. When the board refused to accept an arbitrator's nonbinding decision in favor of the teacher, she returned to court and was ultimately granted a petition for a *writ of mandate*. On further review a California appellate court ruled that under state law the PERB lacked jurisdiction in determining the teacher's appropriate salary step.[48] Accordingly, the grant of the *writ of mandate* was affirmed.

A second California case dealt with the same statutory provisions relating to the appropriate placement of teachers on salary schedules. After the state teachers' association and individual teachers filed a *writ of mandate* seeking an order to adjust salary schedules to permit negotiations regarding increased salary based on criteria other than credits earned and years of experience, a trial court dismissed their petition on the ground that they failed to exhaust their administrative remedies by not taking their case to the PERB. In reversing this ruling, the appeals court held that a determination over whether the salary scale in question violated state law was not within the initial exclusive jurisdiction of PERB and so was properly subject to the jurisdiction of the courts.[49]

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[46] Byron Center Pub. School, Bd. of Educ. v. Kent County Educ. Ass'n, 463 N.W.2d 112 (Mich. Ct. App. 1990).

[47] Semmens v. Board of Educ. of Pontiac Community Consol. School Dist. No. 429, Livingston County, 546 N.E.2d 746 (Ill. App. Ct. 1989).

[48] Dixon v. Board of Trustees of Saugus Unified School Dist., 265 Cal. Rptr. 511 (Ct. App. 1989).

In the first of two 1988 Ohio cases that took almost two years to reach the reporters, a suit was brought by twelve teachers who retired under an incentive program incorporated in their collective bargaining agreement. When the school board adopted a resolution creating a new, more favorable plan under the same contract, the teachers filed an unfair labor practice claim with the State Employment Relations Board (SERB) against the board and their union. Before the SERB reached its decision to dismiss their claims, the teachers brought suit. After the teachers appealed a grant of summary judgment against them, an Ohio appellate court affirmed the trial court's ruling.[50] It held that even though the union arguably breached its duty of fair representation and the board's adoption of the new retirement plan was arguably a violation of the statutory duty to bargain collectively, the trial court lacked jurisdiction to hear the teachers' claims since they were within the exclusive jurisdiction of SERB.

In the second Ohio case, a tenured teacher who was denied tenure as a guidance counselor filed suit seeking declaratory judgment that she was entitled to tenure after her counseling contract was not renewed. The trial court's dismissal of her complaint for a lack of subject matter jurisdiction was affirmed.[51] The appellate court reasoned that since the underlying dispute was covered by the collective bargaining agreement, it was subject to the exclusive jurisdiction of the SERB.

Three teachers who were suspended without pay for two and one half days filed a grievance which was not arbitrated and a petition seeking a *writ of mandate* which was denied. A trial court granted summary judgment in favor of the district in the suit for lost wages and other damages and the Montana Supreme Court affirmed.[52] It reasoned that since the issues surrounding the short term disciplinary suspension of teachers are grievable under the collective bargaining agreement, they were not properly subject to consideration by a trial court.

The two final cases in this subsection were handed down together by a New York appellate court and arose out of a single dispute between a school district and its teachers' union. In the first case the court upheld the dismissal of the union's motion to compel arbitration on two of three memoranda of agreement between the parties.[53] It ruled that because there was no express and unequivocal agreement to submit the dispute to arbitration, the court had jurisdiction to determine the matter. The second case involved the third memorandum of agreement. Here the court affirmed summary judgment in favor of the board.[54] It ruled that since a purported agreement to expand the recall rights of teachers who had been laid off contravened the express terms of the New York State Education Law, it was null and void so that the court properly exercised its authority in granting summary judgment against its enforcement.

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[49] California Teachers' Ass'n v. Livingston Union School Dist., 269 Cal. Rptr. 160 (Ct. App. 1990).

[50] Gunn v. Board of Educ. of Euclid City School Dist., 554 N.E.2d 130 (Ohio Ct. App. 1988).

[51] State *ex rel.* Ramsdell v. Washington Local School Bd., 556 N.E.2d 197 (Ohio Ct. App. 1988).

[52] Debar v. Trustees, Yellowstone County Elementary School Dist. No.2, 796 P.2d 1081 (Mont. 1990).

[53] Board of Educ. of Depew Union Free School Dist. v. Depew Teachers Org., Inc., 562 N.Y.S.2d 274 (App. Div. 1990).

Procedural Issues

Although they are not often dispositive, the procedural aspects of arbitration hearings can have a significant impact on their outcome. Over the past year eight cases were primarily concerned with procedural matters: two cases applied the exhaustion of remedies doctrine; three dealt with methods of obtaining evidence to be used in arbitration proceedings; and three were concerned with filing requirements.

A teacher, who reported an incident in which she witnessed a superior abuse a student, allegedly became subject to a harassment campaign. Several years after the joinder of issue and the denial of the defense's motion to dismiss, she sought to amend her complaint by deleting a libel cause of action and adding claims for breach of contract and harassment. After her motion was denied, she appealed. A New York appellate court reasoned that she could not amend by alleging new facts because it would have caused prejudice to the defendants. Moreover, it ruled that to the extent that she wished to allege contractual violations, she was precluded from judicial relief as she had failed to exhaust administrative remedies available under her collective bargaining agreement.[55]

In a factually complex case, a county superintendent of schools dismissed the complaint of a nonrenewed teacher who alleged that the reasons for her dismissal were not true. While continuing to seek administrative review, she filed suit in November of 1986. The state superintendent affirmed the dismissal of her complaint in April of 1987. In December of 1987 she amended her complaint by alleging breach of contract over the district's failure to comply with the notice and layoff-rehire provisions of its bargaining agreement. However, she failed to seek administrative review over this new allegation. On the same day that the trial court ruled in favor of the district, the state high court handed down a decision requiring county superintendents to hear and decide all controversial decisions of local school boards. Relying on its own precedent,[56] the

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[54] Board of Educ. of Depew Union Free School Dist. v. Depew Teachers Org., Inc., 562 N.Y.S.2d 275 (App. Div. 1990).

[55] Lebow v. Kakalikos, 548 N.Y.S.2d 686 (App. Div. 1989).

[56] Throsell v. Board of Trustees of Gallatin County School Dist. No. 7, 757 P.2d 348 (Mont. 1988).

Montana Supreme Court remanded the case for dismissal by applying the exhaustion of remedies doctrine.[57] It concluded that since the teacher had not exhausted administrative review by an appeal to the county superintendent, the lower court lacked jurisdiction to hear her breach of contract claim.

During a labor strike a local teachers' association and school district cross-filed bad faith bargaining charges with the state ELRB. At the subsequent hearing, the association requested specific documentary evidence relating to the district's bargaining strategies. The district's motion to bar the information from discovery on the ground that it was privileged information was denied and the ELRB issued a subpoena to compel production of the evidence. After the association obtained a court order to enforce the subpoena, the district was granted a reversal. On further appeal, the Illinois Supreme Court upheld the ban against enforcing the ELRB's subpoena.[58] It reasoned that since a decision regarding whether the materials were privileged was the most critical procedural phase in the resolution of this dispute and was more an issue of evidence than labor law, it would be more appropriate for a trial court and not the ELRB to make the decision concerning the extent to which the subpoena should be enforced.

In a second disclosure case, an intermediate New York appellate court was asked to determine whether a school district violated its collective bargaining agreement by failing to pay a teacher her regular salary for one day following her refusal to sign an affidavit to confirm that her absence on a given day was on account of illness. In affirming a ruling against the district, the court held that since the district was unable to establish that the disclosure of information from a nonparty, who was located outside of the state, was necessary for it to present a viable case, it was not entitled to a stay of arbitration.[59]

When an Employment Relations Board (ERB) dismissed an allegation of unfair labor practices brought against a school district over its refusal to provide a school employees association with information in connection with a grievance filed by a terminated employee, the association appealed. An Oregon appeals court affirmed the ERB's dismissal.[60] It reasoned that the association's discovery request was too broad for two reasons. First, it would have involved the files of at least 700 bargaining unit employees; second, the records it sought were not relevant due to the fact that the other employees whose records were sought were not subject to the same statute as the grievant.

A teachers' association filed an unfair labor practice against its school district alleging that it failed to bargain in good faith over a teacher evaluation plan. The state ELRB held that by failing to file a timely answer, the district was deemed to have admitted the material facts alleged in the complaint. An Illinois appeals court affirmed the ELRB's ruling.[61] It held that the district's motion requesting a deferral to arbitration notwithstanding, it would not grant an exception to the general requirement of strict enforcement of administrative agency rules since this was "not the case of an unsophisticated layman lost in a maze of administrative rules,"[62] but was one of a large governmental unit which should have known better.

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[57] Canyon Creek Educ. Ass'n v. Board of Trustees, Yellowstone County School Dist. No. 4, 785 P.2d 201 (Mont. 1990).

[58] Illinois Educ. Labor Relations Bd. v. Homer Community School Dist. No. 208, 547 N.E.2d 182 (Ill. 1989).

[59] *In re* Flood, 550 N.Y.S.2d 379 (App. Div. 1990).

[60] Oregon School Employees Ass'n v. Salem-Keizer School Dist., 797 P.2d 375 (Or. Ct. App. 1990).

In March of 1986 three business teachers were told that their colleagues in the district's vocational education center received a pay supplement; they then wrote to their superintendent in an effort to find out more about the alleged discrepancy. However, it was not until they returned to work that fall and met with their union representative that their suspicions were confirmed. The teachers' grievance for back pay to 1982 was filed within the appropriate statutory time limits, but the superintendent awarded the supplement for only 1986 on the ground that their petition for the previous years had not been timely filed. After a hearing officer affirmed this decision, the teachers appealed. A trial court reversed and held that the grievance had been filed in a timely fashion; it thus awarded the teachers back pay to 1981. The Supreme Court of West Virginia affirmed that part of the award granting the teachers back pay to 1982, reasoning that once the event giving rise to the grievance became known to the teachers, they were not precluded from claiming more than one year. The court reversed the award of back pay to 1981 since it found that the supplements did not begin until 1982.[63]

After a school district refused to rehire a first year teacher at the end of the 1983-84 school year, he filed a grievance. An arbitration award ordering his reinstatement was issued in September of 1984 but was reversed by a grant of summary judgment in October of 1985. In June of 1987 the trial court was reversed on the ground that the ELRB, and not a trial court, had the jurisdiction to review arbitration awards;[64] this ruling was affirmed by the Illinois Supreme Court in 1988.[65] In November of 1987, almost three years after the district first refused to comply with the arbitration award, the unfair labor charge giving rise to this action was filed with the ELRB; in October 1989 the ELRB issued an order finding that the district had committed an unfair labor practice. On further appeal, an intermediate appellate court reversed the ELRB's order.[66] It reasoned that since the six-month period within which to file a finding of an unfair labor practice was not tolled by the district's attempts to set the award aside, the ELRB lacked the jurisdiction to issue such an order.

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[61] Mattoon Community Unit School Dist. No. 2 v. Illinois Educ. Labor Relations Bd., 550 N.E.2d 610 (Ill. App. Ct. 1990).

[62] *Id.* at 614.

[63] Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

[64] Board of Educ. of Community School Dist. No. 1, Coles County v. Compton, 510 N.E.2d 508 (Ill. App. Ct. 1987). *See* The Yearbook of Education Law 1988 at 58 for a full discussion of this case.

[65] Board of Educ. of Community School Dist. No. 1, Coles County v. Compton, 526 N.E.2d 149 (Ill. App. Ct. 1988). *See* The Yearbook of Education Law 1989 at 54 for a full discussion of this case.

Management Prerogatives as a Bar

As strong as the judicial presumption favoring arbitration ordinarily is, matters dealing with managerial prerogatives are excluded from the scope of bargaining and arbitration. This was the situation in a ruling handed down by the Supreme Judicial Court of Maine. In this case a teachers' association alleged that its school board violated the collective bargaining agreement when it sought to hire a department head even though the hiring did not comply with the board's own policy. After the board denied a grievance, it was granted a stay of arbitration by the trial court. On further appeal, the stay was affirmed. Relying on its own precedent,[67] the court reasoned that since the responsibility for filling teaching positions rests with the school board and superintendent, the board could not limit its own statutorily imposed authority through an agreement to arbitrate such a grievance.[68]

JUDICIAL REVIEW

Propriety of Arbitral Awards and Agency Decisions

The deference accorded decisions of arbitrators and state employment relations boards was illustrated in a recent opinion of a New York appellate court. It reasoned that a determination by an arbitrator who has the power to interpret the contract will only be set aside if the decision is "completely irrational . . . or where the document expressly limits or is construed to limit the powers of the arbitrators . . . ."[69] This deference notwithstanding, a large number of arbitral awards and employment relations board rulings were appealed. The cases here are grouped into nine categories: salary and benefits; the use of certified employees; seniority rights;

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[66] Charlestown Community School Dist. No. 1 v. Illinois Educ. Labor Relations Bd., 561 N.E.2d 331 (Ill. App. Ct. 1990).

[67] Board of School Directors of Maine School Admin. Dist. No. 36 v. Maine School Admin. Dist. No. 36 Teachers Ass'n, 428 A.2d 419 (Me. 1981). *See* The Yearbook of Education Law 1982 at 104 for a full discussion of this case.

[68] Maine School Admin. Dist. No. 61 Bd. of Directors v. Lake Region Teachers Ass'n, 567 A.2d 77 (Me. 1990).

[69] Ploen v. Monticello Cent. School Dist., 554 N.Y.S.2d 311, 312 (App. Div. 1990), *citing* Rochester City School Dist. v. Rochester Teachers Ass'n, 394 N.Y.S.2d 179, 181 (N.Y. 1977), *quoting* Lentine v. Fundaro, 328 N.Y.S.2d 418, 422 (N.Y. 1972).

promotion; retirement benefits; discipline; suspension; dismissal; and reinstatement.

Salary and Benefits

When an arbitrator took past practices between a teachers' union and school district into consideration in her interpretation of the salary provisions of the collective bargaining agreement in question, the district appealed its unsuccessful effort to have the award vacated. An appellate court in New York upheld the arbitration award and the trial court's confirmation of it. It reasoned that the arbitrator's reliance on past practices did not render her decision irrational.[70]

A trial court in Ohio granted a school board's motion to vacate an arbitrator's award of lost earnings to a nonrenewed teacher as a result of the board's failure to provide him with restoration rights. After this decision was affirmed by an appellate court, the Supreme Court of Ohio reversed.[71] In reinstating the award the court found that it was properly drawn from the essence of the collective bargaining agreement in effect between the parties which required the board to provide restoration rights in the form of any lost earnings traceable to the board's failure to provide these rights. Therefore, the award was held to be enforceable because it was not unlawful, arbitrary, or capricious.

Voters in a local school district failed to approve and fund an increase in teacher salaries called for by the second year terms of a three-year collective bargaining agreement in effect between the teachers' association and the school district. After the state Public Employee Labor Relations Board dismissed the district's charge of unfair labor practices against the association for its refusal to reopen negotiations over salaries, the district appealed. The New Hampshire Supreme Court reversed and remanded.[72] It ruled that in the absence of any evidence that the voters in the district had any knowledge of the financial terms relating to all three years of the bargaining agreement, the district was not bound to fund the remaining two years of salary increases.

An arbitrator in Pennsylvania relied on past practices to rule that a school district was required to include military service payments in the salaries of employees who began working in the district subsequent to the adoption of its collective bargaining agreement. After a trial court affirmed the arbitration award, the district appealed. On further review, an appellate court ruled that an arbitration decision is permitted to draw its essence from an underlying collective bargaining agreement if the arbitrator bases his conclusions on past practices.[73] Accordingly, it affirmed both previous rulings and concluded that the district was required to continue to make the payments even though they were not explicitly mentioned in the agreement.

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[70] Board of Educ. of North Babylon Union Free School Dist. v. North Babylon Teachers' Organization, 548 N.Y.S.2d 38 (N.Y. 1989).

[71] Board of Educ. of Findlay City School Dist. v. Findlay Educ. Ass'n, 531 N.E.2d 186 (Ohio 1990).

[72] Appeal of Sanborn Regional School Bd., 579 A.2d 282 (N.H. 1990).

An arbitrator in Montana ordered a school district to pay the entirety of health insurance premiums for all employees in a school district rather than only for those district employees who were married to one another. He reasoned that if the district did not treat all employees equally, it risked violating state and federal antidiscrimination laws. After a trial court vacated this award, the teachers' association appealed. The Supreme Court of Montana reversed the lower court's judgment and reinstated the arbitration award.[74] It ruled that since the arbitrator's decision to compel payment of the insurance premiums was within the limits of his contractual authority and not unlawful, the lower court was without power to set his decision aside.

Use of Certified Employees

A school district in New York required its physical education teachers to supervise the classes of their absent colleagues that were taught by uncertified substitutes. A grievance filed by the teachers' union was resolved by entering into a settlement agreement ensuring that only certified substitutes would be permitted to cover classes when any of the physical education teachers were absent. Subsequently, the district reverted to its practice of permitting teachers who were not certified to conduct the classes. After the union received an arbitration award in its favor, the district appealed. An appellate court confirmed the arbitrator's ruling.[75] It rejected the district's arguments and held that the arbitrator's award directing compliance with an agreement over the use of certified substitute teachers did not impermissibly infringe on the district's authority to determine the curriculum and teacher qualifications.

Seniority Rights

Four individuals who resigned from their teaching positions in a Pennsylvania school district and later returned to work agreed to be placed on the same salary step as newly hired teachers. The teachers' association filed grievances alleging that they had been placed at a lower level than required under their bargaining agreement. After the grievances were denied, an arbitration award was entered granting the teachers credit for their past years of experience in the district. When a trial court upheld the award, the district sought further review. An appellate court found that although the bargaining agreement was silent on the question of seniority rights, both parties had agreed that state law on point was incorporated by reference into the contract. Thus, it affirmed the arbitration award since it was drawn from the essence of the agreement and was not manifestly unreasonable.[76]

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[73] McKeesport Area School Dist. v. McKeesport Area Educ. Ass'n, 566 A.2d 1283 (Pa. Commw. Ct. 1990).

[74] Glasgow Educ. Ass'n v. Board of Trustees, Valley County School Dist. 1 and 1A, 791 P.2d 1367 (Mont. 1990).

[75] Board of Educ., Yonkers City School Dist. v. Yonkers Fed'n of Teachers, 562 N.Y.S.2d 318 (App. Div. 1990).

In a case from the state of Washington, school bus drivers and their union appealed the denial of a contract grievance arising out of their district's restoration of seniority rights to a driver who returned to her former position two years after being promoted out of the bargaining unit. On appeal the Supreme Court of Washington affirmed a grant of summary judgment in favor of the district.[77] It ruled that since resignation within the meaning of the collective bargaining agreement applied only to resignation from the district and not the bargaining unit, there was no basis for a grievance over the bus driver's seniority rights.

Promotion

The New York State PERB found that a city board of education committed unfair labor practices by failing to promote applicants for the position of associate staff analyst on the basis of their membership in a collective bargaining unit. In so doing, it reversed an administrative law judge's dismissal of the charge and ordered a *de novo* review of all of the candidates. A New York appellate court affirmed the PERB's ruling.[78] It held that substantial evidence supported the finding that the board improperly excluded the applicants from consideration for promotion.

Retirement Benefits

A school district offered a special benefits package to teachers who participated in a three-year early retirement program. After taking part in the first year, a teacher retired and the school district determined that because he did not complete the entire program, he was not entitled to benefits. The teacher's association filed a grievance on his behalf which resulted in an arbitration award reinstating him as a full participant in the program. The district appealed and had the arbitrator's award vacated. On further review, an appellate court in Pennsylvania reinstated the award.[79] It upheld the arbitrator's conclusion that the teacher did not violate the intent of the program, he merely retired earlier than he originally projected and was therefore entitled to the retirement benefits.

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[76] Centennial School Dist. v. Centennial Educ. Ass'n, 576 A.2d 99 (Pa. Commw. Ct. 1990).

[77] Wheeler v. East Valley School Dist., 796 P.2d 1298 (Wash. 1990).

[78] Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 560 N.Y.S.2d 873 (N.Y. 1990).

Discipline

A grievance filed by teachers who were docked a days pay for not taking part in a field trip that extended past the end of the school day was denied by their school board. An arbitrator found that while there were sufficient grounds to impose some discipline on the teachers, the loss of a days pay was too severe. He thus modified the penalty to a formal letter of warning which had already been placed in their personnel files. In an unsuccessful action brought by the teachers to require the board to accept the arbitrator's ruling, a trial court granted the board's petition to hold the teachers and their union liable for legal fees arising out of their suit. In a review limited to the propriety of the court ordered sanctions, an appellate court in Illinois reversed.[80] It reasoned that since the teachers' suit was based on the results of an arbitrator's decision, the statute permitting the recovery of fees from parties who brought suit without reasonable cause was inapplicable.

Suspension

A permanent teacher was suspended for two days without pay by his school board after he removed the glossaries from 146 text books owned by the district. The teacher was granted summary judgment but this was reversed on further review. An Indiana appellate court affirmed.[81] It ruled that the board's decision to suspend the teacher did not violate the master agreement with the teacher's union or the teacher's individual contract because it was appropriate under the circumstances.

Dismissal

A state ERB's denial of an allegation of an unfair labor practice against a school district for its attempted dismissal of a school maintenance worker due to his ''habitual tardiness'' was reversed on appeal.[82] On remand, the ERB affirmed its earlier ruling. In a second appeal the association representing the worker alleged that the district had committed an unfair labor practice by its failure to follow the agreed upon procedures in their collective bargaining agreement prior to seeking the worker's discharge. An Oregon appeals court agreed with the association.[83] It reversed and remanded the case for reconsideration.

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[79] Upper St. Clair Educ. Ass'n v. Upper St. Clair School Dist., 576 A.2d 1176 (Pa. Commw. Ct. 1990).

[80] Hazel Crest Fed'n of Teachers, Local 2077 v. Board of Educ. of School Dist. 152 ½, Cook County, 563 N.E.2d 1088 (Ill. App. Ct. 1990).

[81] Board of Trustees of Hamilton Heights School Corp. v. Landry, 560 N.E.2d 102 (Ind. Ct. App. 1990).

[82] Oregon School Employees Ass'n, Chapter 89 v. Rainier School Dist. No. 13, 754 P.2d 9 (Or. Ct. App. 1988). *See* The Yearbook of Education Law 1989 at 52 for a full discussion of this case.

A Pennsylvania case illustrates one of the few 1990 cases where an arbitrator was found to have gone beyond the bounds of his authority. Mitigating personal circumstances notwithstanding, a tenured male high school teacher-coach who sent love letters to two female students was immediately dismissed by the school board on the grounds of immorality. An arbitrator agreed that the teacher's conduct was immoral, but found that immediate termination was too harsh. He entered an order calling for suspension without pay and counseling. A trial court's vacation of the award was affirmed.[84] An appellate court ruled that once the arbitrator determined that the district had just cause in dismissing the teacher for immorality, he was without authority to alter its penalty.

Reinstatement

A number of school bus drivers were placed on involuntary administrative leave and pre-termination hearings were scheduled when a school board became aware of the fact that they had felony convictions on their records. After the drivers' union instituted grievance proceedings, a tentative settlement was reached under which all of the drivers were reinstated. However, none of the three plaintiffs in this action agreed to the terms of the settlement even though they were reinstated. The bus drivers filed suit alleging that they had not been afforded appropriate pre-termination hearings or an opportunity to present reasons why they should not have been suspended. A federal district court in Ohio found that they were given notice and an opportunity to respond and so rejected their first claim. However, it also ruled that the board's post-termination grievance procedure failed to comply with state law and concluded that they were entitled to back pay with interest for the time they were out of work.[85]

A part-time school custodian who failed a physical examination due to his inability to lift certain objects was suspended by the superintendent. While his grievance was pending, the school board changed the suspension to a dismissal based on its allegation that he had misrepresented his physical condition at the time he was hired. An arbitrator determined that the record did not support the district's actions and ordered reinstatement with full seniority and back pay. A trial level and intermediate appellate court in Pennsylvania both affirmed the arbitration award. Subsequently, the board offered to reinstate the custodian but did not mention back pay. The custodian refused the district's offer and an arbitrator ordered the district to comply with the terms of the earlier award. The district filed another appeal but in the interim, between its filing and oral argument, it complied with the arbitrator's ruling. Hence an appellate court granted the district's motion to dismiss for mootness.[86]

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[83] Oregon School Employees Ass'n, Chapter 89, v. Rainier School Dist. No. 13, 786 P.2d 1311 (Or. Ct. App. 1988).

[84] Manheim Cent. Educ. Ass'n v. Manheim Cent. School Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990).

[85] Sutton v. Cleveland Bd. of Educ., 726 F. Supp. 657 (N.D. Ohio 1989).

A New York case affirmed decisions by an arbitrator and a lower court.[87] It held that an arbitration order reinstating a grievant's position as a teaching assistant with back pay less an offset for any outside earnings could not be set aside because of a poorly drafted sentence dealing with the pay offset, since the remainder of the award was clear, unambiguous, final, and definite.

A social studies teacher placed on unrequested leave of absence due to declining enrollment, changes in curriculum, and financial limitations in her district, requested a hearing pursuant to state law. After a hearing examiner found that neither the bargaining agreement, past practices, nor the bargaining history between the parties suggested an interpretation that included a realignment of positions to allow her to retain her job, she appealed. On further review, a Minnesota appellate court reversed in favor of the teacher.[88] It reasoned that since the school board had a statutory duty to realign, the teacher was entitled to reinstatement; it also ordered a hearing to determine the full amount of back pay plus interest due to her.

A school committee directed the bus company which served its students to terminate a number of drivers. One of the discharged workers went to arbitration and won reinstatement as the arbitrator found that the committee lacked sufficient cause to direct the driver to be discharged. The arbitrator also awarded the driver back pay less any adjustments for income he might not have earned if driving. Although it had agreed to be bound by arbitration, the committee brought suit to vacate the award. A judge confirmed the award of back pay but vacated the reinstatement portion of the order. A Massachusetts appeals court ruled that even if the arbitrator had exceeded her authority by ordering the school committee to reinstate a driver who was never its employee, her decision could be understood to have meant that the committee was required to instruct the bus company to reinstate the driver. Thus, it ruled that the arbitration award could be enforced in its entirety.[89]

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[86] Minersville Area School Dist. v. Commonwealth Labor Relations Bd., 568 A.2d 979 (Pa. Commw. Ct. 1990).

[87] *In re* Vermilya, 550 N.Y.S.2d 516 (App. Div. 1990).

[88] *In re* Bristol, 451 N.W.2d 883 (Minn. Ct. App. 1990).

[89] School Comm. of Boston v. United Steelworkers of Am., Local 8751, 557 N.E.2d 51 (Mass. App. Ct. 1990).

The plant engineer of a school district was dismissed for allegedly sharing marijuana with a student. When an arbitrator found that the decision maker who imposed this penalty was not only not impartial, but also deprived the engineer of due process, she reduced the penalty to a one-year suspension without pay; she also ordered him to participate in an employee's assistance program after reinstatement. The district succeeded in having the award vacated and the engineer's union appealed on his behalf. A Wisconsin appellate court reversed.[90] It ruled that a court can vacate an arbitrator's decision only if it misconstrues or disregards the law or if it is illegal or violates strong public policy. And, concluding that none of these grounds was present, it affirmed the arbitrator's decision to reinstate the engineer.

After a school district dismissed two school bus drivers who were at a PERB hearing rather than transporting students, the New York State PERB found that the district's action constituted an unfair labor practice. The district appealed and a New York appellate court affirmed the PERB's determination.[91] It reasoned that since the union established that the drivers' attendance at the hearing was a protected activity and other similarly situated employees received less severe penalties, there was substantial evidence to support the PERB's determination. Therefore, the court ordered that the drivers be reinstated with back pay.

A teacher, who was furloughed when his school district experienced a decrease in enrollment, sought the help of his association to gain reinstatement. Although the teachers' association initially filed a grievance on his behalf, it later withdrew its support because of its involvement in another proceeding that ultimately had an adverse effect on his seniority rights as they related to the furlough. Thus, his grievance was denied without a hearing. After a court ordered school board hearing upheld the furlough, the same court ruled that his seniority should not have been reduced by the earlier arbitration proceeding and ordered his reinstatement with full seniority. On further review an appellate court in Pennsylvania affirmed his reinstatement.[92] It reasoned that the school board was precluded from using the results of the arbitration hearing against the teacher since he was not a party to it.

The final case in this section deals with a teacher who, because of a history of visual and mobility problems, was assigned to teach mathematics to small groups of students in a specially designed support skills program. While acting in his capacity as the grievance coordinator for his teacher's association, he advised his colleagues that they were not obligated to attend an after school meeting called by the principal. Subsequently, he was informed that the support skills program was being discontinued and that he would be reassigned as a regular classroom teacher. After the state PERB found this to be an unfair labor practice, the school district filed suit. An appellate court in New York found that not only was the PERB's determination supported by evidence that the program was improperly eliminated due to anger over the teacher's advice to his colleagues, but also that its decision to order his reinstatement was neither arbitrary nor capricious.[93] Thus, it affirmed the PER's ruling and ordered the teacher's reinstatement to his previous position.

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[90] Racine Unified School Dist. v. Service Employees' International Union, Local 152, 462 N.W.2d 214 (Wis. Ct. App. 1990).

[91] Board of Educ. of Deer Park Union Free School Dist. v. State Pub. Employment Relations Bd., 561 N.Y.S.2d 810 (App. Div. 1990).

[92] Arcurio v. Greater Johnstown School Dist., 582 A.2d 402 (Pa. Commw. Ct. 1990).

IMPASSE and FACT-FINDING

Following an impasse in bargaining over salary and fringe benefits, a school district and teachers' association submitted their differences to mediation and fact-finding. When the board rejected the recommendations of the fact-finder and the association refused a counter proposal, the district unilaterally imposed a contract that failed to make the proposed compensation package retroactive. The association challenged the board's actions as a prohibited labor practice. A trial court found that a board had the right to offer a unilateral contract. This right notwithstanding, an appellate court in Kansas ruled that the board had committed an unfair labor practice where its contract offer was reduced by the costs it incurred in mediation and fact-finding.[94] The court rejected the argument that it would be unfair for the teachers to receive the same amount of increase offered prior to the impasse. However, it also ruled that since most of the teachers had accepted the board's unilateral contract offer, the association did not have the right to request or receive reimbursement on behalf of its members.

When a school board rejected the salary schedule in a proposed bargaining agreement, a teachers' association petitioned for fact-finding under the impasse procedures of Iowa law. The board rejected the fact-finder's recommendation that the salary scale under the tentative agreement be adopted and the parties went to arbitration before the state PERB. The PERB concluded that since the tentative agreement was the result of good faith bargaining, it should not be disturbed. A trial court accepted the board's petition for review and affirmed the arbitration panel's award. An appeals court in Iowa ruled that since there was substantial evidence to support

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92. Arcurio v. Greater Johnstown School Dist., 582 A.2d 402 (Pa. Commw. Ct. 1990).
93. Uniondale Union Free School Dist. v. Newman, 562 N.Y.S.2d 148 (App. Div. 1990).
94. Unified School Dist. No. 279, Jewell County v. Secretary, Dep't of Human Resources, 788 P.2d 867 (Kan. Ct. App. 1990).

the PER's conclusion that the fact-finder's recommendation was the most reasonable under the circumstances, it would not disturb that finding.[95]

STRIKES and SANCTIONS

A school board was found to have violated the terms of its collective bargaining agreement in its implementation of a RIF when it gave preference to less senior teachers who had not participated in a strike against the district. After a Louisiana court remanded on the question of whether some of the teachers would have been laid off under any circumstances,[96] several teachers were reinstated by the trial court. When the court permitted the board to deduct an amount equal to the unemployment benefits received by the teachers in their award of back pay, the teachers appealed. On further review, a Louisiana appeals court upheld the offset.[97] It reasoned that since nothing in public policy supports double recovery in the form of unemployment benefits and a full award of back pay, the board's offset was proper.

In a second Louisiana case, the union representing striking teachers and other school employees filed suit seeking an injunction prohibiting the school board from firing the striking workers after court ordered mediation failed to resolve the issue of whether collective bargaining would take place. The board cross filed for injunctive relief to enjoin the strike. A trial court denied relief to either party, but an appellate court ordered the trial court to grant injunctive relief to the board. The Louisiana Supreme Court reversed. It reasoned that the lower court incorrectly interpreted the state's "Little Norris-Laguardia Act"—this Act was patterned after federal legislation and prohibits strikes only where they endanger public health and safety. The court held that since the grounds on which to prevent a strike did not apply, they had a right to strike over their demand for collective bargaining.[98]

Conversely, the West Virginia courts ruled against the right of teachers to strike. When teachers engaged in a work stoppage to protest the failure of the governor and state legislature to enact a satisfactory wage and benefits package, a trial court held that the strike was illegal as it would result in irreparable harm to the public school system. On further review, the West

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[95] Moravia Community School Dist. v. Moravia Educ. Ass'n, 460 N.W.2d 172 (Iowa Ct. App. 1990).

[96] St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Bd., 503 So. 2d 69 (La. Ct. App. 1987). *See* The Yearbook of Education Law 1988 at 63 for a full discussion of this case.

[97] St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Bd., 556 So. 2d 157 (La. Ct. App. 1990).

[98] Davis v. Henry, 555 So. 2d 457 (La. 1990).

Virginia Supreme Court affirmed.[99] It ruled that in the absence of legislation, the common law rule recognized in both federal and state courts denying public employees the right to strike remained in effect.

MISCELLANEOUS DECISIONS

While many of the cases in this chapter can fit into more than one section, some cases seem to defy classification altogether. The four cases that follow present issues that do not readily fall within the preceding sections.

The first case deals with a school district's challenge to the authority of the Pennsylvania Labor Relations Board (PLRB). The district filed suit seeking to enjoin any hearings on, or adjudications of, two unfair labor practices filed by its teachers' association. It claimed that because the legislative action that extended the life of the PLRB had been declared unconstitutional by the Pennsylvania Supreme Court, it lacked authority to act. The court disagreed, pointing out that the unconstitutionality of the law notwithstanding, the court's ruling was handed down several years after the PLRB's reauthorization and was only to be applied prospectively. It ruled that the district "won the battle but lost the war" because it failed to state a clear right to relief.[100] Therefore, the court dismissed the district's motion for a preliminary injunction.

After several years of compliance with a term in its collective bargaining agreement under which a school system agreed to pick up and deliver mail of its teachers' association, a decision of the United States Supreme Court called the legality of this practice into question.[101] The system, then, found itself on the horns of a dilemma. If it stopped delivering the mail it risked breaching its contract with the association, but if it complied it risked violating federal law which granted the Postal Service a monopoly over mail delivery. After an arbitrator ordered a limited resumption of mail delivery, the Postal Service apprised the parties of their potential civil and criminal liability. In order to protect itself from liability to either side, the school system sought declaratory judgment from a federal district court in Indiana, asking it to declare the rights of the parties and to indicate which, if any, mail it could lawfully deliver. The teachers' motions to dismiss and abstain were denied as the court ruled that the district had stated a sufficient case for relief.[102]

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[99] Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 393 S.E.2d 653 (W. Va. 1990).

[100] West Shore School Dist. v. Pennsylvania Labor Relations Bd., 570 A.2d 1354 (Pa. Commw. Ct. 1990).

[101] Regents of the Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589 (1988).

[102] Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, 735 F. Supp. 907 (N.D. Ind. 1990).

A local newspaper sought access to a copy of a tentative bargaining agreement between a school district and the unions representing school personnel. After a trial court dismissed a motion of summary judgment against the newspaper, it appealed. The Michigan appellate court pointed out at the outset that while the newspaper had obtained a copy of the contract after it was ratified, thus rendering the issue moot, it would affirm the lower court's ruling.[103] It reasoned that since the lower court correctly found that the tentative bargaining agreement was exempt from disclosure under the state's Freedom of Information Act, its judgment would be left undisturbed.

The final case in this chapter deals with another state Freedom of Information Act. Here a union brought suit against the state's Teacher Retirement System in an effort to compel the disclosure of names and other pertinent information concerning its enrollees. The union explained that since 96% of all public school teachers in the state were under collective bargaining agreements, the retirement system alone had the information it needed if it wished to reach prospective members in a bid to convince them to change union affiliation. The trial and appellate courts in Indiana both denied the union's motion for summary judgment in light of the system's refusal to disclose the names of its enrollees. The appeals court reasoned that the information sought by the union was per se exempt from disclosure under the Act and so the union had no right to obtain it.[104]

CONCLUSION

The number of cases dealing with collective bargaining continues to be large and is likely to remain so. Thus, while bargaining has brought a measure of tranquility to labor relations in education, it has not obviated the need to seek judicial resolution to labor conflict. The differences between management and labor notwithstanding, the courts continue to apply well established principles in settling labor disputes and do not appear to be anxious to usher in new trends any time soon.

Although no new trends emerged in 1990, the down turn suffered by the national and local economies may have a significant impact on bargaining over the next few years. That is, as economic woes afflicting the federal and state governments reduce the amount of aid provided local school districts, the potential for economic strife between districts and their employees can be expected to increase. As the economic and other issues surrounding collective bargaining are not likely to disappear any time soon, 1991 promises to be an interesting year.

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[103] Traverse City Record Eagle v. Traverse City Area Pub. Schools, 459 N.W.2d 28 (Mich. Ct. App. 1990).

[104] Healey v. Teachers Retirement Sys., 558 N.W.2d 766 (Ill. App. Ct. 1990).

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PUPILS

Henry S. Lufler, Jr.

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INTRODUCTION

Cases arguing about the use of school facilities by religious groups continued to increase in number in 1990. A United States Supreme Court decision[1] affirming the use of a high school classroom by a Christian student group during an after-school activity period should help to direct future litigation in this area. While religious rights cases increased, cases involving home instruction and student searches, each the subject of much litigation in recent years, declined in number. In the school desegregation section of the chapter, perennially an area of lengthy arguments and much litigation, the financing of desegregation plans occupied the attention in most cases. Increasingly, desegregation cases focus less on developing remedies and more on the question of which party pays for them.

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[1] Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990).

PUBLIC SCHOOL ASSIGNMENT, TUITION, and TRANSPORTATION

Tuition and Assignment

School districts sometimes argue that a child is domiciled outside the district and refuse to provide the student with an education without the payment of tuition. The problems inherent in such cases are exacerbated when neither of the districts involved feels that the child's education is its responsibility. In one such case, a New York school district sought to avoid paying tuition for students who resided with their parents until they were placed in a foster home in an adjoining district.[2] The district where the parents lived refused to accept a certification by the local social services department that the placement had occurred, arguing that it should have access to the children's confidential records maintained by the agency in order to contest the question. The appeals court disagreed and ruled that the certificate presented by the agency was adequate proof.

In another New York case, the parents of a teenage student sought to have the residency of their daughter transferred to an adjoining district where the student's aunt resided. The arrangement, however, was informal and was not accompanied by a change in legal guardianship. A lower state court ruled that the aunt's local school board had arbitrarily denied the student an education, and she continued to attend school there until she dropped out at age sixteen. The case continued in a federal district court when the student's parents sought damages from the district for the weeks of school missed by the student before the state court had acted. The federal court dismissed the damage claim and went on to rule that the state court had erroneously decided the residency question in the first place.[3] The court found that the student had suffered no loss of property rights because she was free to attend school where her parents resided and that parents may not unilaterally decide where residency for educational purposes occurs.

Two 1990 cases contained challenges to textbook rental fees assessed by school districts against families who claimed they were unable to pay and were eligible for a waiver. In the first, an Indiana school district unsuccessfully argued that it should be able to collect partial fees, even in the face of a state statute requiring full payment by the district for families meeting eligibility standards.[4] A Utah court also ruled in a similar case that a local school district could not have a waiver policy more restrictive than that promulgated by the state education board.[5] The local board had sought to restrict fee waivers only to those receiving public assistance.

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[2] Three Village Cent. School Dist. v. Brentwood Union Free School Dist., 561 N.Y.S.2d 800 (App. Div. 1990).

[3] Rogowski v. New Hartford Cent. School Dist., 730 F. Supp. 1202 (N.D.N.Y. 1990).

[4] Gohn v. Akron School, 562 N.E.2d 1291 (Ind. Ct. App. 1990).

[5] Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990).

Attorney fees also were awarded to the Utah plaintiff, who had raised constitutional claims that were not considered when the case was decided on state law grounds.

Iowa parents who challenged a multidistrict grade sharing plan saw their case dismissed when it was ruled that they lacked standing to bring the suit.[6] The Iowa court concluded that the parents' children were not "affected pupils," because none of them would be forced to change their current school attendance site as the result of the plan. Iowa law restricts appeals to those forced to change schools. The state law does not permit raising other assignment plan effects, such as its cost to parents, that were advanced by the plaintiffs as the justification for their opposition.

Home Instruction

No new legal issues were raised in 1990 home instruction cases, with courts relying on previous decisions to hold that states may regulate the home programs. In a Michigan case, an appeals court upheld the conviction of parents for violating compulsory attendance laws, rejecting a variety of constitutional and statutory challenges.[7] At the heart of their case, the plaintiffs claimed personal religious convictions as justification for their decision to educate their children at home. A state law, however, required those providing home instruction to have a teaching certificate. A previous state supreme court decision had allowed a lower court decision to stand that approved the certification requirement in the face of first amendment free exercise claims, the same set of facts presented in the current case.[8] Both Michigan courts reasoned that parents could select a certified home instruction teacher who espoused the religious perspectives they wanted, thereby negating the free-exercise claim.

In addition to declining to reverse on first amendment grounds, the Michigan appeals court in the current case also held that the certification requirement did not violate the fourteenth amendment right of parents to control their children's education. The court used a rational relationship test, concluding that the requirement served the legitimate state purpose of ensuring that all children received a basic education. The court also found that the school district did not have to comply with a state law regarding the closing of private schools when challenging a home instruction program and that there was sufficient evidence to sustain the original convictions.

In an earlier case just published, an Ohio appeals court sustained the conviction of parents for failing to comply with that state's attendance laws.[9] The defendants in the case raised a long list of procedural objections. They failed to convince the appeals court, however, that they should have been afforded a jury trial, with the court concluding that the attendance law penalty was too low to make trial possible. The court also concluded that the local superintendent was not required to conduct a hearing to determine if the parents were "fit" to educate their children at home. The case had started with no-contest pleas to the original charges, and such issues only could be raised if the parents had pleaded not guilty.

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[6] Brekke v. State Bd. of Educ., 449 N.W.2d 345 (Iowa 1989).

[7] People v. De Jonge, 449 N.W.2d 899 (Mich. Ct. App. 1989).

[8] Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).

An Idaho parent violated the terms of a court approved agreement regarding the home instruction of his children, and was held to be in contempt of court. The plaintiff had agreed to provide the school district with standardized test scores for his children, but after two test periods had refused to comply further. The plaintiff then sought a jury trial on the contempt charge and attempted to reopen all the issues that were the subject of the original consent decree. An appeals court held that the misdemeanor contempt charge did not require a jury trial and suggested that compliance with the original agreement was in the best interest of both the children and the state.[10]

Finally, Maine's highest court rejected an appeal filed by a home instruction father who claimed that his free exercise rights had been abridged when he was fined $200 for failing to send his daughter to school.[11] The court concluded that the defendant had failed to demonstrate any sincerely held religious views.

Compulsory Attendance

Courts generally hold that parents are responsible for causing their children to attend school, unless the child has become unruly and the parents have lost control. School districts may not, therefore, proceed against students using delinquency proceedings if it is their parents who are responsible for the nonattendance. In a case illustrating this point, a Minnesota appeals court held that a student could not be declared to be "habitually truant" when it was the parent who was responsible.[12] The court held that the label would unfairly stigmatize the student.

PRIVATE and PAROCHIAL SCHOOLS

Cases involving private and parochial schools generally concern issues arising from the contracts that parents sign with the schools, or challenges to the expulsion of students. In 1990 cases, however, two comparatively unusual matters were litigated: a challenge to a state law requiring private schools to supply basic student information to the state, and a claim that a private school was guilty of educational malpractice.

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[9] State v. Levy, 563 N.E.2d 358 (Ohio Ct. App. 1988).

[10] Bayes v. State, 785 P.2d 660 (Idaho Ct. App. 1989).

[11] State v. Friel, 582 A.2d 252 (Me. 1990).

[12] *In re* B.K.J., 451 N.W.2d 241 (Minn. Ct. App. 1990).

Challenges to state reporting requirements have traditionally originated when parents educating their children at home argue that their religious convictions preclude their cooperation with the state, even to the extent of providing basic information about the educational status of their children. Courts have upheld the reporting requirements for home instruction parents, concluding that a parent's modest loss of personal religious freedom when supplying information is outweighed by the state's compelling interest in ensuring that all children are receiving a basic education.[13] In a 1990 case, a Vermont private school with more than fifty students sought to avoid supplying the state with pupil names and other data.[14] The case commenced when one of the parents affiliated with the school was charged with violating the state's compulsory attendance law.

While nothing in the religious doctrine of the church running the school precluded supplying the information, testimony before a lower court had revealed that some of the parents were "suspicious" of the state's motives in collecting the data. On appeal from the lower court's misdemeanor conviction of the parent, the parents alleged that their free exercise rights were being abridged. The Vermont Supreme Court disagreed, holding that the reporting requirement constituted the least restrictive way that the state might exercise its obligation to monitor the educational progress of children. A variety of other state and federal constitutional claims and state statutory challenges raised by the defendants also were rejected.

Plaintiffs have prevailed with tort claims alleging that public schools failed to provide statutory educational requirements or, in the case of private schools, that specific courses promised in a contract were not taught. Courts, however, universally have rejected the opening of a new area of tort liability by accepting the concept of educational malpractice as the reason for a student's failure to learn. Nevertheless, a Kentucky private school was accused of malpractice in a case that originated when it refused to readmit a student for his junior year. The court was asked to find that the student's previous poor performance resulted from the school's failure to instruct him properly, or to compensate for his "attention deficit disorder." The suit also alleged that teacher comments that the student was "lazy" or had not "properly applied himself" constituted slander. None of these claims was supported by a state appeals court.[15] The court found that the school was not obligated to readmit the student and that nothing in the contract between the school and the parent obligated the school to design a special educational program for him to ensure that he would obtain at least average grades. The court also held that comments made to the student about his performance were qualifiedly privileged and that no harm had befallen the student as the result of the statements.

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[13] *See* Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) (home-school statute requiring submission of information to the state does not violate the free exercise clause).

[14] State v. DeLaBruere, 577 A.2d 254 (Vt. 1990).

[15] Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (Ky. Ct. App. 1990).

A school operated by an Hasidic sect became the defendant in a case when the parents of six children who were expelled from the school challenged the action.[16] The expulsions occurred two months before the end of the school year and were brought about by the parents' expulsion from the congregation running the school. A school bylaw required all children in attendance to be the offspring of members and mandated the immediate withdrawal of those children whose parents leave the congregation. In spite of the fact that the bylaw is clear, six months passed before the school asked the students to withdraw. A state court ruled that it was arbitrary and capricious for the school to require them to leave just before the end of the school year, when placement alternatives would be difficult to find. The court also found the rabbi of the congregation to be in contempt of court for resisting the orders issued in the case.

A bitterly contested divorce case was central in a father's response to a lawsuit initiated by a private school to recover unpaid tuition owed for a child's education.[17] The case hinged on an oral contract made to the school by the father that he would pay the tuition. While the father later claimed the pledge was made under duress, the court rejected this claim, holding that the child had attended the school, and by accepting the service the father had accepted the responsibility to pay. The father's claim, that his promise to pay was conditioned on the fact that the check to the school would be co-endorsed by his former wife, was remanded for a lower court to consider.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Cases arguing the propriety of school searches are controlled by the Supreme Court's decision in *New Jersey v. T.L.O.*[18] T.L.O. was a high school student who denied to school officials that she had been smoking in a rest-room. A search of her purse, however, revealed not only a pack of cigarettes, but also a quantity of marijuana and other evidence that she had been selling drugs at school. When the case reached it, the Court affirmed a "reasonableness" standard for school searches, rather than the probable cause standard required for searches in criminal cases, and held that the methods used to search a student should be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[19] Lower courts have used the decision to weigh fourth amendment challenges to school searches, finding in almost all of the cases that school officials acted appropriately.

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[16] Waldman v. United Talmudical Academy, 558 N.Y.S.2d 781 (Sup. Ct. 1990).

[17] Bishop v. Westminster Schools, Inc., 397 S.E.2d 143 (Ga. Ct. App. 1990).

[18] New Jersey v. T.L.O., 469 U.S. 325 (1985).

In 1990 cases, courts considered a variety of searches that yielded evidence of drug sales and the possession of weapons, including sawed-off rifles and a machete. In several of these cases, criminal prosecution of the students resulted. In *T.L.O.*, the evidence gathered was used only in a school disciplinary proceeding. As in the cases that follow, lower courts have used the Court's *T.L.O.* holding regardless of the penalty that followed.

In the first of several 1990 drug cases, two students decided to purchase marijuana cigarettes from a third student whom they had heard was selling drugs. According to their account, they then intended to report the sale to the principal. After an exchange of money, but before receiving the marijuana, a teacher overheard an argument about the drug sale and reported the incident to the principal, who subsequently searched the plaintiff. The search yielded the money the students had paid and a cassette case filled with marijuana cigarettes.

When a criminal prosecution resulted, the plaintiff argued that the search was unreasonable and sought to distinguish the case from *T.L.O.* by arguing that the search resulted only from the uncorroborated accusation of another student and not as the result of observations made by school officials. A state appeals court disagreed, holding that the teacher's involvement in overhearing the drug-related argument was adequate information to permit the search of the student's jacket where the drugs were found.[20]

A search of a student's car and a locked briefcase was challenged in a Washington case.[21] Two student informants whose information had proved reliable in the past informed a principal that drugs were being sold in the school parking lot. When the defendant was called into the principal's office, he was asked to remove the contents of his pockets, which included $230 in small bills and a pager number. A subsequent search of the student's car revealed the pager, which was alleged to have been used to place drug orders, and a large quantity of marijuana. The appeals court affirmed the search process, holding that nothing in *T.L.O.* was intended to limit searches only to a student's immediate possessions, especially when the search of the student turned up evidence that additional contraband might be found in the car.

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[19] *Id.* at 336.

[20] Berry v. State, 561 N.E.2d 832 (Ind. Ct. App. 1990).

[21] State v. Slattery, 787 P.2d 932 (Wash. Ct. App. 1990).

A student who was found wandering in a school corridor while classes were in session was stopped by a principal, who then observed that the student was clutching a book bag as if trying to conceal it. When the bag finally was opened in the principal's office, a .22 caliber pistol was found. After a misdemeanor conviction for carrying the weapon in school, the plaintiff questioned the reasonableness of the principal's search. An appeals court found no constitutional violation, holding that the principal's action was justified by his previous contacts with the student and the student's unusual behavior in trying to conceal the bag.[22]

In a Massachusetts gun case, two students told their teacher that another student had brought a gun to school to settle a dispute that occurred in the previous week. A search of the student's locker uncovered a sawed-off rifle and a bullet. After his conviction by a judge, the defendant sought a retrial on the ground that the search of the locker was unreasonable. Massachusetts' highest court ruled otherwise, holding the search was reasonable, given the information that school officials had received.[23] The court went on to add that probable cause to conduct the search also seemed to be present.

A playground disorder led to a police search when a principal was told that students were carrying weapons to use in a gang-related fight. The search of a student revealed that he was carrying a machete inside a trouser leg. When the student was placed under court supervision, a challenge to the search resulted. The court concluded that the search not only was reasonable, but was "constitutionally compelled."[24] The court reasoned that the tip given to the principal that a gang fight was imminent required him to take the action involving the police.

First Amendment Religious Rights

Conflicting federal courts of appeal decisions regarding the applicability of the Federal Equal Access Act[25] to student religious clubs was resolved by the Supreme Court in 1990. The Act requires public secondary schools that receive federal funds and that maintain a "limited open forum" for student activity groups to provide the access without regard to the content of speech at the meetings of a group. A 1989 Ninth Circuit Court of Appeals decision[26] held, notwithstanding the Act, that a student group wanting to use a classroom for before school prayer meetings could not do so without violating the "test" established by the Court in *Lemon v. Kurtzman*[27] for considering establishment law violations.

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[22] Williams v. State, 782 S.W.2d 251 (Tex. Ct. App. 1989).

[23] Commonwealth v. Carey, 554 N.E.2d 1199 (Mass. 1990).

[24] *In re* Alexander B., 270 Cal. Rptr. 342 (Ct. App. 1990).

[25] 20 U.S.C.A. §§ 4071 *et seq.* (West 1985).

[26] Garnett v. Renton School Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989), *superseded*, 874 F.2d 608 (9th Cir. 1989) (use of a public school classroom for before school prayer would advance religion and would foster government entanglement with religion).

In another 1989 case, the Eighth Circuit Court of Appeals considered an Access Act challenge and reached the conclusion that a high school that had allowed such noncurricular student groups as a scuba club and two groups affiliated with Rotary International to meet after school could not deny a Bible club the same opportunity.[28] The Supreme Court upheld the Eighth Circuit decision.[29] Writing for the majority, Justice O'Connor noted that the Access Act did not define the critical term "noncurriculum related student group," but concluded in light of legislative history that Congress had intended to provide a low threshold for triggering the requirements of the Act.[30] Looking at the thirty clubs in existence at the school in question, the Court majority found that several of them clearly were not directly related to the curriculum and that equal access for the Bible group had therefore not been provided in a school where a limited open forum clearly existed. Having decided the case on statutory grounds, the majority declined to comment on the respondent's free speech and free exercise claims.

Four of the justices also concluded that the Act as applied to the facts of the case in question did not violate the establishment clause. Using *Lemon*, they found that the Act had a secular purpose, did not have the primary effect of advancing religion, and did not lead to the school's entanglement with religion. In the only dissent to the central holding in the case, Justice Stevens concluded that the Act should be read as recognizing "a much narrower forum than the Court has legislated into existence today."[31]

The use of mobile classrooms parked on parochial school grounds to provide remedial educational services under chapter 1[32] continued to be litigated after it was determined in 1988 that taxpayers have standing to bring the suit.[33] On remand from the Eighth Circuit, the district court heard a series of establishment clause challenges brought against the methods used to provide the chapter 1 services in Missouri. The plaintiffs in the case argued that the state's use of an "off-the-top" funding formula to pay for the educational services provided to parochial school students and the use of the trailers both were contrary to the Supreme Court's holding in *Aguilar v. Felton*.[34] The plaintiff's argument on the funding approach used by the state was buttressed by data showing that it cost substantially more per pupil to provide the chapter 1 services to private school students.

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[27] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[28] Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989); *see* The Yearbook of Education Law 1990 at 74.

[29] Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990).

[30] *Id.* at 2366.

[31] *Id.* at 2383.

[32] The Education Consol. and Improvement Act of 1981, 20 U.S.C. §§ 3801-8 (1982 and supp. III, 1985).

[33] Pulido v. Bennett, 860 F.2d 296 (8th Cir. 1988); *see* The Yearbook of Education Law 1989 at 73.

The district court characterized its task as having to determine if the difference was "so grossly disproportionate" as to confer "a direct benefit" on the private schools.[35] The court concluded that the direct effect of the state policy bypassing public schools to give the funds directly to parochial schools was *de minimus*. But the spending of significantly more money on parochial school students was found to violate the establishment clause. The court also drew what it acknowledged were "fine lines," holding that portable classrooms could be parked on public streets, but not on the grounds of the parochial schools. Partial attorney fees were awarded to the plaintiffs.

A private school in California funded in part by chapter 1 also was the subject of an establishment clause challenge.[36] The school, a residential home for pregnant, unwed, teenage girls, was run by a nonprofit corporation that was affiliated with a Catholic order. The school, however, was found by the court to be entirely secular, having no religious affiliation entrance requirements and a curriculum without religious teachings of any sort. The court therefore rejected the plaintiff's arguments, also holding that the provision of educational supplies to the private school students did not violate the test in *Lemon*. The computers that were a part of the assistance were "locked" so that they could accept only prescreened secular software.

The provision of religious classes within public schools and on school grounds was challenged in two district court cases; both programs were found to violate the establishment clause. A Virginia court invalidated a program of religious instruction that was provided in buses parked at the curb outside the front door of an elementary school.[37] The buses were like those that the school used, but were owned by a religious group, which also was permitted by school administrators to enter classrooms to hand out enrollment cards to students. Students received bags of candy if all those in a classroom signed up for the religious program. The court issued a restraining order to stop the program.

Bible classes held during the school day and in school classrooms were found to violate the establishment clause by an Arkansas court.[38] *McCollum v. Board of Education*[39] invalidated precisely the same sort of program, with the Court holding that religious instruction during the school day aided religion because students were released from their legal obligation to attend school in order to take part in the program. Attempts by the defendants in the current case to argue that the Bible class was secular in nature were unsuccessful. The challenged instruction had been offered in the system for over fifty years.

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[34] Aguilar v. Felton, 473 U.S. 402 (1985) (federal funds cannot be used to pay public school teachers who provide instruction on private school premises without violating the establishment clause).

[35] Pulido v. Cavazos, 728 F. Supp. 574, 585 (W.D. Mo. 1989).

[36] Walker v. San Francisco Unified School Dist., 741 F. Supp. 1386 (N.D. Cal. 1990).

[37] Doe v. Shenandoah County School Bd., 737 F. Supp. 913 (W.D. Va. 1990).

[38] Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989).

[39] McCollum v. Board of Educ., 333 U.S. 203 (1948).

Challenges to religious invocations and benedictions at high school commencement exercises continued, with the three cases to be discussed in this year's chapter all concluding that the practice violated the establishment clause. A Rhode Island district court rejected arguments that *Marsh v. Chambers*[40] was controlling at a high school commencement, holding that "the special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice."[41] The First Circuit upheld the decision a few months later, holding that the invoking of a deity in the benediction violated the establishment clause.[42] In dissent, one of the judges hearing the case argued that a system of rotating those presenting the invocations to ensure that a wide range of religious and ethical beliefs were represented would not run afoul of the first amendment.

In a less traditional graduation prayer case, parents and a minister who had previously delivered invocations attempted to force a school board to have prayers at commencement, arguing that their free speech and free exercise rights would be violated by their exclusion.[43] The school board had omitted the traditional prayers after they were informed by their insurance carrier that the board members might be held personally liable for damages if they allowed them, as federal case law in the state held that such prayers violated the establishment clause. The district court rejected the free speech claim, holding that the commencement ceremony was not a "public forum" and that its content was totally under the control of the school system. Plaintiffs also failed to convince the court that their right to the free exercise of their religion had been abridged, since there had been no showing that graduation prayer was an integral part of any organized religion.

Litigation attacking an Illinois statute requiring all elementary school children to recite the Pledge of Allegiance continued in 1990. The case was filed by atheists who object to the words "under God" contained in the pledge. The district court in a 1990 decision rejected the defendant school district's attempts to have the case dismissed.[44] While it was agreed that the plaintiff's child had not been forced to recite the pledge, and that a state court might later rule that the statute was nonmandatory, the district court concluded that the question of whether a school led pledge resulted in unconstitutional coercion still had to be addressed. To leave this issue to a state court in subsequent litigation would, the court reasoned, merely delay an already lengthy proceeding.

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[40] Marsh v. Chambers, 463 U.S. 783 (1983) (prayers before the opening of a legislative session are "embedded in the history and tradition of this country" and do not violate the establishment clause).

[41] Weisman v. Lee, 728 F. Supp. 68, 73 (D.R.I. 1990).

[42] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

[43] Lundberg v. West Monona Community School Dist., 731 F. Supp. 331 (N.D. Iowa 1989).

[44] Sherman v. Community Consol. School Dist. 21, 745 F. Supp. 1371 (N.D. Ill. 1990).

A ten-by-twelve foot painting of the crucifixion of Jesus that had hung for over twenty years in a high school auditorium became the subject of a lawsuit when a student's parents saw it and later sought its removal. Various attempts by the school to claim that the work was not religious in nature, representing the secular theme of "man's inhumanity to man," were unsuccessful. A district court concluded that an "average observer" would find that the painting had a religious theme and that its presence in the school therefore violated the second prong of the *Lemon* test by conveying a message of governmental endorsement of religion.[45]

New York's highest court heard a challenge to that state's mandatory AIDS education curriculum. Lower courts had held that the requirement directing the inclusion of material about AIDS in health education courses, starting in kindergarten, did not violate the plaintiff's religious rights. The New York Court of Appeals concluded that the state had not made a sufficient showing for a summary judgment and remanded the case in order to give plaintiffs the opportunity to meet the "high threshold of proof" required to prove that their religious rights were violated by the curriculum.[46] The plaintiffs, members of a strict religious community, practice "spiritual separatism," by which they seek to distance themselves from all things they consider evil. While they send their children to public schools, they otherwise lead isolated lives and argued that the community's lack of contact with the larger society obviated the need for the curriculum. The state countered with a compelling interest argument centered around the fact that children might some day leave the religious community. The case was remanded for a consideration of these two conflicting points of view.

A Minnesota law permits public high school juniors and seniors to take a limited number of courses at two- and four-year colleges, some of which are religiously affiliated. The statute was attacked by a teachers' union, and the case initially centered on the union's standing to bring the suit. The Eighth Circuit Court of Appeals settled the threshold issue by ruling that the union lacked standing, but that the president of the union individually had standing as a taxpayer.[47] Upon remand, the district court then considered the first amendment challenge to the plan, which deducted a portion of state shared revenue from the student's district and gave it to the college.[48] A Bible college having withdrawn from the program, the court then gathered extensive information about the remaining eight schools, finding that seven of them had religious traditions and affiliations but that they were not "pervasively sectarian." As to the remaining school, the court decided that more information was needed, precluding summary judgment.

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[45] Joki v. Board of Educ. of Schuylerville, 745 F. Supp. 823 (N.D.N.Y. 1990).

[46] Ware v. Valley Stream High School Dist., 545 N.Y.S.2d 316 (App. Div. 1989), *aff'd as modified*, 550 N.E.2d 420 (N.Y. 1990).

[47] Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989).

A New Hampshire school district awarded an annual scholarship to a "worthy protestant boy" until it decided in 1987 that it should seek to change the discriminatory terms of the trust providing the funds to prevent the district's involvement in an equal protection violation. The district sought to substitute the term "worthy student." The New Hampshire Supreme Court ruled that the administration of the trust by the district constituted state action and that a lower court could not substitute a private party for the school system so that the original wording of the trust could continue.[49] The court reasoned, in the absence of any information to the contrary, that the scholarship donor had intended to aid a student at the school as a first priority, rather than having the principal purpose of seeking to support a protestant male.

First Amendment Freedom of Expression

Hazelwood School District v. Kuhlmeier[50] began when a principal deleted two pages of a high school newspaper that contained stories about student pregnancy and drug use. The paper, which was produced as part of a journalism class, was published with two blank pages. In upholding the principal's action, the Supreme Court held that the paper was not a forum for public expression and concluded that "educators do not offend the first amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[51]

Subsequent expression cases have been heavily influenced by the Court's decision in *Hazelwood*. In a New York case, however, a district court declined "to read the decision with the breadth its dictum invites."[52] Following his discharge as the faculty supervisor of his school's newspaper, the teacher argued that his removal violated his first and fourteenth amendment rights. The teacher's discharge followed the publishing of a student editorial opposing a federal holiday in memory of Martin Luther King, Jr. The school system argued that *Hazelwood* gave them broad latitude to regulate the content of the school sponsored newspaper. The district court refused to grant summary judgment to the defendants, holding that it was unclear whether the masthead of the school paper, which stated that the content of the paper did not reflect the views of the school, was in force at the time of the firing. In *Hazelwood*, the Court had observed that the school newspaper in the case carried the "imprimatur of the school."

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[48] Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990).

[49] *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990).

[50] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[51] *Id.* at 273.

[52] Romano v. Harrington, 725 F. Supp. 687, 689 (E.D.N.Y. 1989).

A student who was denied the opportunity to run for student council president filed suit arguing that his substantive due process rights had been violated.[53] Under the election system used by the school, two-thirds of a candidate's teachers must sign a statement attesting that the candidate had demonstrated appropriate behavior and attitudes in school. When the plaintiff, who admitted he had been "outspoken" at school, failed to generate the necessary signatures, the lawsuit resulted. The court held that students did not have a constitutional right to run for student council office and that the actions of the teachers in not approving his candidacy were related to "legitimate pedagogical concerns," as enumerated in *Hazelwood*.

A suit seeking damages was filed after school officials rejected the contents of a valedictory speech which a student had planned to give at commencement exercises. The parties agreed to have the case heard by a magistrate, with appeal to the Fifth Circuit Court of Appeals. The magistrate held that the school could reject the speech, which was wholly religious in nature. On appeal, the Fifth Circuit upheld the magistrate, declining to reach the constitutional issues presented, holding instead that the suit was moot because the school officials held qualified immunity and that the plaintiff could not recover damages.[54]

A school newspaper story alleging that a teacher was "a babbler" and "the worst teacher" at his school resulted in a suit against a school district and the paper's advisor, with the faculty member referred to in the story claiming that he had been defamed and had suffered emotional distress. A California state court held that the statements were not actionable.[55] The court found that the statements represented exaggerated expressions of the student writer's feelings about the teacher, but that a reader would not necessarily conclude that they were statements of fact.

SANCTIONS for STUDENT MISCONDUCT

Two 1990 cases weighed the appropriateness of penalties used against students. The first was an appeal of a 1988 decision which held that an unwed mother could be dismissed from the National Honor Society (NHS) for violating the requirements of leadership and character.[56] The student alleged that her rights under title IX and 42 U.S.C. sections 1983 and 1985 had been violated because unwed fathers had not been similarly dismissed. The district court disagreed, holding that the school district had acted because the student had engaged in premarital sex, rather than because she was a mother.

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[53] Bull v. Dardanelle Pub. School Dist. No. 15, 745 F. Supp. 1455 (E.D. Ark. 1990).

[54] Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990).

[55] Moyer v. Amador Valley Joint Union High School Dist., 275 Cal. Rptr. 494 (Ct. App. 1990).

On appeal, the Third District remanded the case to allow the lower court to hear additional testimony.[57] The district court had refused to admit testimony from a male student who was prepared to say that he had impregnated his girlfriend, whom he subsequently married, without being dismissed from the NHS. The student also intended to testify that he had told teachers at the school about his behavior. In addition to calling for the male student to testify, the appeals court expressed its view that title IX permitted the assignment of damages, an issue on which the Supreme Court has never ruled. Other federal courts of appeal have held that compensatory damages are not recoverable under title IX.

A Minnesota student filed suit when she was punished for violating a school rule prohibiting students from attending parties where alcoholic beverages were served.[58] It was not disputed that the plaintiff had been present at the party, but the student claimed that the rule violated her right to associate freely with her peers. As punishment for attending the party, the student lost the opportunity to participate in several swim meets and was required to return a previously won athletic letter awarded for her participation on the softball team.

The Minnesota District Court devoted most of its attention to the claim that the student had lost a constitutionally protected right to free association, a concept not fully developed in previous education decisions. To address the claim, the district court turned to decisions originating outside the educational setting. In a 1984 case, the Supreme Court developed the concept that relationships could be distributed on a continuum, ranging from those involving family members to those of a commercial nature.[59] The regulation of association, the Court held, required a careful examination of the relationship being regulated, with the most scrutiny being required for regulations applying to the most personal relationships. Applying this analysis to the case at hand, the district court found that high school social events were not a form of intimate association entitled to constitutional protection.[60] The court also held that the rule was rationally related to the school's legitimate desire to reduce peer pressure as a reason for student alcohol consumption.

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[56] Pfeiffer v. Marion Center Area School Dist., 700 F. Supp 269 (W.D. Pa. 1988); *see* The Yearbook of Education Law 1989 at 79-80.

[57] Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990).

[58] Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990).

[59] Roberts v. United States Jaycees, 468 U.S. 609 (1984) (ending discrimination against women constituted a compelling state interest justifying state action to end a male only membership requirement).

[60] *See also* City of Dallas v. Stanglin, 490 U.S. 19 (1989) (ordinance limiting the use of dance halls to persons age fourteen to eighteen did not infringe on a constitutional right of association).

Recovery of attorney fees and costs was argued in a case originating in a boarding school operated by the Federal Bureau of Indian Affairs. When a variety of disciplinary actions, including the handcuffing of a student to a fence, resulted in a lawsuit, a district court appointed a special master to resolve the issues presented. The master settled the case by recommending a variety of new discipline policies and procedures to be followed at the school. The master's fee award recommendation, however, was contested by the government, which sought to claim that the teachers responsible for the actions against the students were acting outside their official capacities. The Ninth Circuit Court of Appeals disagreed, holding that the students were the prevailing party, and that the teacher's actions were not so egregious as to require that they be sued as individuals in order for the students to recover fees and costs.[61]

Suspensions and Expulsions

Several 1990 state court decisions discussed the adequacy of the procedures followed by school districts prior to the expulsion of students. In the first case, a student who had threatened a teacher and his principal, and had violated other school rules, was expelled by a school board. The expulsion was challenged and damages were sought by the student's father. A state appeals court ruled that a lower court had erred by considering testimony in the case beyond that contained in school board minutes. The decision by the appeals court in turn was overruled by the Illinois Supreme Court, and the expulsion was upheld.[62] The Illinois high court concluded that the presence of a constitutional claim for damages under 42 U.S.C. section 1983 made the case more than a review of an administrative decision. An administrative decision to expel a student required only a review of the official record, but once the constitutional violation was alleged, the lower court had the obligation to hear evidence beyond the board's official minutes.

A Missouri student who brought a knife to school was suspended for ten days. The ten-day penalty was assessed by the student's principal in recognition of the student's excellent school record and the fact that the knife had not been used. A lawsuit was filed when the suspension was extended by the school superintendent and school board to cover the rest of the semester. A lower court ruled that the extended penalty was arbitrary, and the school district appealed. An appeals court reversed, holding that the board's standard policy of lengthy suspensions for the possession of weapons was not unreasonable.[63]

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[61] Ramon v. Soto, 916 F.2d 1377 (9th Cir. 1989).

[62] Stratton v. Wenona Community Unit Dist. No. 1, 526 N.E.2d 201 (Ill. App. Ct. 1988), *rev'd*, 551 N.E.2d 640 (Ill. 1990).

A school district sought to appeal a case it had lost when a lower court ruled that a student should not be placed in an ''alternative school'' for students with disciplinary problems as the result of skipping classes. An appeals court declined to hear the case because the student already had graduated and identical cases were unlikely to occur in the future.[64]

Corporal Punishment

Corporal punishment cases that involve the use of force considered by plaintiffs to be excessive lead to claims that a student's substantive due process rights had been violated. In reviewing these substantive due process claims, courts rely on a number of circuit court decisions. It must be determined, for example, ''whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.''[65] Few corporal punishment cases have resulted in a finding that a student's substantive due process rights were violated, though many of the cases are settled and disappear from the record once courts decline to grant summary judgment to defending school systems.

A middle school band student playing the clarinet who was hit on the head by his teacher filed suit alleging a substantive due process violation.[66] When asked during his deposition why he hit the student, the teacher did not have an answer, though portions of his testimony reported that the student had failed to puff his cheeks properly while playing. Given the fact that the district court could not determine why any punishment was administered, the defendant's motion for summary judgment was denied and the case was continued.

A Wisconsin district court considered a case involving a mathematics teacher who threw a student into a blackboard.[67] While the plaintiff sought to have the case considered as one not involving corporal punishment, the court ruled otherwise, holding that the student had been asked to remain after class and that the altercation had occurred as the result of perceived classroom misbehavior. The court then looked at the teacher's actions, concluding that it lacked sufficient information to decide if the teacher had acted without malice. Because a decision on the question of the teacher's motives involved weighing the credibility of testimony given by the parties, the court refused to grant summary judgment. The school district and several administrators were, however, dismissed as parties in the case.

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[63] Consolidated School Dist. No. 2 v. King, 786 S.W.2d 217 (Mo. Ct. App. 1990).

[64] Payne v. J.T.N., 568 So. 2d 830 (Ala. Civ. App. 1990).

[65] Wise v. Pea Ridge School Dist., 855 F.2d 560, 564 (8th Cir. 1988); *see also* Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (corporal punishment when ''literally shocking to the conscience'' may be a substantive due process violation).

[66] Meyer v. Litwiller, 749 F. Supp. 981 (W.D. Mo. 1990).

[67] Thrasher v. General Casualty Co. of Wis., 732 F. Supp. 966 (W.D. Wis. 1990).

DESEGREGATION

New cases were recorded in a number of long-standing desegregation disputes. The Supreme Court addressed the question of the power of district courts to order the funding of desegregation remedies, addressing the question of whether courts have the power to order property tax increases in spite of a state mandated increase limit. In cases involving the unitary status of school districts, considerable differences among courts regarding the standards to be used continued to be recorded.

Cross-district Remedies

The cost of desegregation remedies and the division of responsibility for paying were at the heart of almost all the 1990 cross-district remedy cases. The Supreme Court entered the lengthy dispute over who should pay for desegregation in Kansas City, Missouri, ruling that a district court attempt to impose a property tax increase violated the principles of federal/state comity.[68] The district court had ordered the tax increase after concluding that the provisions of state law that required a two-thirds voter approval precluded a favorable referendum outcome.[69] The Eighth Circuit Court of Appeals upheld the one-time levy increase set by the court, but held that future increases must be set by the local government body with state authorities enjoined from using state laws to prevent their collection.[70] The Supreme Court decision affirmed the second part of the court of appeals decision.

While the Court was unanimous in holding that district courts could not set specific property tax levies to enforce desegregation orders, only five justices agreed that courts could order a local government body to raise taxes as a desegregation remedy. The majority opinion did not address the scope of the remedy the district court had ordered, stating that it had granted *certiorari* only to hear the tax question. Citing *Milliken v. Bradley*,[71] the Court held that state laws could be set aside in order for local governments to pay their share of remedying a constitutional violation. To rule otherwise, the Court reasoned, would fail to take into account the obligations of local governments under the supremacy clause to fulfill constitutional duties.

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[68] Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

[69] Jenkins v. Missouri, 672 F. Supp 400 (W.D. Mo. 1987); for a discussion of this and other Kansas City cases, *see* The Yearbook of Education Law 1989 at 87-8.

[70] Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).

[71] Milliken v. Bradley, 443 U.S. 267 (1977).

In dissent, four justices argued that the setting of taxes was not a judicial function. They began, however, by assailing the scope of the remedy ordered by the district court, arguing that the plaintiffs and the Kansas City board were adversaries in name only. Both groups, the dissent suggested, were trying to make the entire Kansas City district a magnet, so that suburban majority group students would attend. In pursuit of this goal, no cost controls had been exercised in the development of remedies costing in excess of $450 million. This led the dissenting opinion to characterize the remedial order as "unlike any before seen."[72] The minority concluded that were it to consider "judicial taxation" to remedy a constitutional violation, enforcement of the remedy ordered in the case at hand would not be the one where such a step would be taken.

Another Eighth Circuit case involving Kansas City also was recorded in 1990. Addressing the involvement by suburban school districts in the highly polarized litigation, the decision consolidated several cases and ordered the district court to develop a voluntary interdistrict transfer plan.[73] The state and suburban districts had agreed on a plan in 1985, but the failure of the state to meet its funding promises was used by the suburban districts as justification for not starting it. The appeals court ordered lower court jurisdiction over the plan to ensure that the impasse was broken.

The financial obligation incurred by the state of California when it signed a consent decree designed to desegregate San Francisco schools was argued before the Ninth Circuit Court of Appeals. By agreeing to the decree in 1983, the state assumed responsibility for funding the plan. In 1985, however, a state law was passed limiting state reimbursement in desegregation cases to no more than 80%. A federal district court held that the state must stick with its agreement, but the Ninth Circuit disagreed.[74] The appeals court found that nothing in the agreement spoke to the possibility that the state funding formula might be changed. In fact, portions of the decree could be read as offering less than unqualified guarantees of funding. Looking at other litigation concerning consent decrees, the Ninth Circuit found that it was bound strictly by the decree's express language. While the decree in question was not sufficiently clear to cause the appeals court to order the full payment, it did suggest a loophole, observing that the lower court still had the power to modify the decree.

The state of Arkansas agreed to a financial settlement with the other parties in the Little Rock school desegregation case, even though there was no agreed upon plan on which to spend the funds. The cash settlement was affirmed by the district court, but not the portion of the agreement that attempted to limit the remedies that might be suggested by the special master appointed by the court.[75] The court scolded the parties for their lack of commitment to implementing a plan, ordering the entire payment to be used to fund desegregation and suggesting that even the counsel for minority students seemed to have agreed that some funds might be used for other purposes. The court therefore ordered that the state funds be placed in an escrow account. It also assailed the school district for the "blatant disregard" of prior court orders in the case, indicating that it was contemplating what further action to take.[76]

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[72] 110 S. Ct. 1651, 1676.

[73] Jenkins v. Missouri, 900 F.2d 1174, *modified*, 904 F.2d 415 (8th Cir. 1990).

[74] San Francisco NAACP v. San Francisco Unified School Dist., 695 F. Supp. 1033 (N.D. Cal. 1988), *rev'd*, 896 F.2d 412 (9th Cir. 1990).

The Little Rock court rejected the attorney fees proposed in the settlement agreement. The court observed that the Little Rock district was the principal prevailing party, but had agreed to pay the bulk of the fees, thereby reducing the amount available to fund the desegregation plan. Furthermore, the court questioned the method of fee calculation, finding that some of them were being assessed for litigation "terminated decades in the past."

Litigation concerning desegregation in St. Louis continued in 1990, with courts resorting to a case numbering system in order to keep track of the numerous published decisions. In its latest decision in the case, the Eighth Circuit Court of Appeals upheld a court order establishing a comprehensive plan for St. Louis magnet schools.[77] The assignment of responsibility to pay for the capital costs associated with the plan were central to the board's appeal. The state share of the magnet plan costs was 20% higher than it was paying to fund district-wide remedies, so the board sought to have magnet plan capital costs shifted to the higher category. The appeals court agreed with the district court that the board could not now raise the funding issue, since it had not appealed earlier when the magnet plan costs were listed with the others. The school district also failed in its attempt to secure more than one-time funding for magnet school capital improvements.

The district court in the St. Louis case also considered the continuing question of how to desegregate secondary level vocational education schools.[78] Two existing vocational systems, one operated by the public schools and the other by a special school district, were castigated by the court, which indicated its "profound lack of confidence" in the boards running each of them. The court therefore ordered a "choice and competition" system which would allow the two systems to compete for students. The court would retain control over the racial balance in the two systems, and expressed its willingness to modify the plan, which it admitted might require fine tuning.

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[75] Little Rock School Dist. v. Pulaski County Special School Dist., 726 F. Supp. 1544 (E.D. Ark. 1989).

[76] *Id.* at 1553.

[77] Liddell v. Board of Educ., City of St. Louis, 696 F. Supp. 444 (E.D. Mo. 1988), *aff'd*, 907 F.2d 823 (8th Cir. 1990).

[78] Liddell v. Board of Educ., City of St. Louis, 733 F. Supp. 1324 (E.D. Mo. 1990).

Segregated schools in Charleston County, South Carolina and the role of the state in maintaining them were the subjects of a new case brought by the federal government.[79] In 1967, the South Carolina legislature enacted legislation that consolidated the eight separate school systems in the county into a single system, except that control of teacher and student assignments was retained by the old systems. The legislation had the effect of redistributing economic resources among the former districts, some of which were poor while others had greater tax revenues. The legislation also resulted in the perpetuation of several mostly black districts, to which the plaintiffs objected by claiming that their equal protection rights had been violated.

The district court concluded that the failure to include student assignment in the legislation did have a "slightly segregative effect," but that the legislature had no affirmative duty to redraw district lines that had been in effect since before the *Brown v. Board of Education*[80] decision in 1954. It did not follow, the court reasoned, that the positive step of achieving economic redistribution in the county must necessarily be accompanied by any particular steps to achieve other ends that also would be desirable from the plaintiff's perspective. Holding that the burden of proof was on the plaintiffs, the court found after a lengthy examination of the legislative history of the consolidation act that there was no evidence that racial animus was involved in the decision to exclude student and staff transfers.

Desegregation Plan Oversight

The Supreme Court has never articulated precise standards for lower courts to use when deciding whether a school district that is implementing a court supervised desegregation plan has achieved unitary status and can be relieved from court supervision. In general, courts employ the six factors offered in *Green v. County School Board*,[81] looking at the racial balance of the school system in the areas of student assignment, faculty and staff composition, transportation, facilities, and extracurricular activities. There is no agreement among the circuit courts of appeal, however, on the question of whether a system can be declared unitary on some but not all of the factors. Some courts have held that all six factors must be found to be in racial balance simultaneously, while others have held that areas can be removed from court supervision one at a time.

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[79] United States v. Charleston County School Dist., 738 F. Supp. 1513 (D.S.C. 1990).

[80] Brown v. Board of Educ., 347 U.S. 483 (1954).

[81] Green v. County School Bd., 391 U.S. 430 (1968).

Arguments about unitary status were central to most of the 1990 desegregation plan oversight cases. In the long standing litigation regarding Denver's attempt to achieve desegregation, the Tenth Circuit Court of Appeals upheld district court decisions that unitary status had not been reached.[82] The school district had attempted to argue that it had achieved desegregation, in spite of the recent emergence of three racially identified elementary schools. The appeals court agreed with the district court that the three schools had become segregated as the result of board action. For both courts, the reemergence of segregated schools was sufficient evidence that the board's dedication to desegregation was not sufficiently strong to declare the district unitary. Control over what the appeals court called the "slow and acrimonious" litigation was retained in the district court.

The return of *Brown* was ensured when the Tenth Circuit overturned a district court ruling and allowed the plaintiffs to reopen it.[83] The district court had placed the burden on the plaintiffs to show that current segregation in the Topeka school system was the result of purposeful school board conduct. The Tenth Circuit majority disagreed, holding instead that the defendants were required to show that the effects of past discrimination had dissipated. "After a plaintiff establishes intentional segregation at some point in the past and a current condition of segregation, a defendant then bears the burden of proving that its past acts have eliminated all traces of past intentional segregation to the maximum feasible extent."[84] The appeals court opinion rejected the defendants' argument that some showing of intent was necessary before the school board could again be held liable for segregated schools in Topeka.

The Tenth Circuit majority finding was made in the face of data showing that Topeka's schools had become less segregated in the past decade. These data were down played by the majority, which found that this desegregation had occurred because of forces beyond the board's control and because of the pressure brought on the board by the filing of the lawsuit. In dissent, one of the judges hearing the case disagreed with the majority's finding on burden of proof, arguing that even if the burden argument were correct the case should be remanded to the district court for hearings using the correct legal principles. Instead, the case was remanded for the application of a remedy after the appeals court itself reviewed the facts and reached the conclusion that the board was guilty of failing to eradicate discrimination. The dissent also accused the majority of using "perfect racial balance" as its standard in the case.[85]

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[82] Keyes v. School Dist. No. 1, 653 F. Supp. 1536 (D. Colo. 1987) and 670 F. Supp. 1513 (D. Colo. 1987), *aff'd*, 895 F.2d 659 (10th Cir. 1990); *see* The Yearbook of Education Law 1988 at 105.

[83] Brown v. Board of Educ., 671 F. Supp. 1290 (D. Kan. 1987), *aff'd in part and rev'd in part*, 892 F.2d 851 (10th Cir. 1989).

[84] 892 F.2d 851, 859.

[85] *Id.* at 894.

The Fifth Circuit Court of Appeals heard an appeal from a district court finding that the Fort Worth school district had achieved unitary status.[86] The district court had found the district to be "unitary in every respect, except for the existence of a homogeneous student population."[87] Unlike the Topeka school district, Fort Worth schools had become increasingly segregated, with a massive busing program proving ineffective in maintaining racial balance. There were 33,000 fewer white students enrolled in the district in 1984 than were present in 1968. The appeals court held that the district court had not erred in concluding the present segregation was caused by this population shift and not by school board action. At the end of a three-year period, the district court must hold a final hearing before the district is declared unitary.

A Texas district court concluded that the Waco school district had achieved unitary status.[88] The court found that the district had complied fully with desegregation plan requirements. The plaintiffs in the case had sought to have court supervision continue, arguing that higher dropout rates for minority students and lower enrollments of minorities in gifted and talented programs were evidence of continuing discrimination.

Desegregation in Cleveland continued at a snail's pace, with a district court observing that it had waited ten years for the defendants to comply with remedial orders.[89] In spite of public statements that they would comply with court orders, no plan for desegregation has been submitted. The court ordered the district to submit a report by December 1990.

Plaintiffs alleging discrimination in an Austin, Texas elementary school student assignment plan were unsuccessful in reopening a long dormant case when a 1987 Fifth Circuit decision upheld a district court ruling refusing to grant an injunction against the plan.[90] After a more than two-year delay, the district court heard arguments in the assignment plan case.[91] The court used a discriminatory purpose test to review the plan, which ended most busing of students. While the new approach to student assignment had a disparate impact on minority children, creating additional racially identified schools, the court concluded that the plan should stand because of the lack of convincing evidence as to the board's intent to discriminate.

School defendants seeking to avoid further court supervision of desegregation in a Delaware county were unsuccessful in convincing a district court that they should not be ordered to implement a State Board of Education student assignment plan.[92] Local defendants in the case had argued that they had complied fully with court orders issued in 1978 and 1981, but the court concluded that it had retained jurisdiction over the case and that the plaintiffs did not need to prove discriminatory intent on the part of the local school officials when seeking modifications and immediate implementation of the proposed assignment plan. The court refused, however, to order the plan into effect for 1990, accepting the argument that the start of the school year was too close to make it effective.

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[86] Flax v. Potts, 915 F.2d 155 (5th Cir. 1990).

[87] Flax v. Potts, 725 F. Supp. 322, 330 (N.D. Tex. 1989); *see* The Yearbook of Education Law 1990 at 93.

[88] Arvizu v. Waco Indep. School Dist., 732 F. Supp. 721 (W.D. Tex. 1989).

[89] Reed v. Rhodes, 741 F. Supp. 1295 (N.D. Ohio 1990).

[90] United States v. Texas Educ. Agency, 671 F. Supp. 484 (W.D. Tex. 1987), *aff'd sub nom.*, United States v. Overton, 834 F.2d 1171 (5th Cir. 1987); *see* The Yearbook of Education Law 1988 at 98-9.

[91] Price v. Austin Indep. School Dist., 729 F. Supp. 533 (W.D. Tex. 1990).

State Court Cases

The Supreme Court of Arkansas heard a case in which school districts brought suit to halt the payment of state funds to meet the obligations of federal court decisions in *Jenkins*, the Little Rock desegregation dispute.[93] The plaintiff's class action claims were on state equal protection grounds, with the districts arguing that the Little Rock payments violated the formulas in the statute. The court held that the compliance with federal court orders by the legislature was a legitimate, if not compelling, state interest and that the state-aid formula could be modified to achieve the required compliance.

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[92] Coalition to Save Our Children v. Buchanan, 744 F. Supp. 582 (D. Del. 1990).

[93] Magnolia School Dist. No. 14 v. State Bd. of Educ., 799 S.W.2d 791 (Ark. 1990).

4

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INTRODUCTION

Litigation over the rights of students and school employees with handicaps continued at a significant level. As in the past few years, much of the litigation in 1990 concerned the provision of an appropriate special education placement, due process rights, and recovery of attorney fees by prevailing parents under the Handicapped Children's Protection Act of 1986 (HCPA).

In past years one of the more controversial issues, in terms of frequency of litigation, was whether prevailing parents were entitled to recover attorney fees when a final resolution to their special education dispute came at the administrative hearing level. Although the majority of courts have held that they are entitled to a fee award, the controversy intensified in 1989 when a divided panel of the District of Columbia federal appeals court ruled that they were not.[1] However, in 1990 that same court, sitting *en banc*, reversed its previous decision.[2] It is now fairly well settled in the federal circuits that attorney fees are available for representation at the administrative level.

Litigation concerning the rights of students under section 504 increased significantly in 1990 over the previous year's level. While some of that litigation involved higher education students, the majority of cases were filed on behalf of students at the elementary and secondary level.

ENTITLEMENT to SERVICES

The Education for All Handicapped Children Act (EHCA) requires school districts to provide handicapped students with a free appropriate public education, consisting of any needed special education and related services.[3] However, the EHA does not establish any specific substantive standards by which those services can be judged to be adequate. The Act provides that the handicapped student is to be provided with specially designed instruction[4] in conformance with the student's individualized education program (IEP).[5] The Supreme Court has held that the handicapped student is entitled to personalized instruction with sufficient support services to permit the student to benefit educationally from the instruction provided.[6] The courts have been cautioned not to impose their views of preferable educational methods on school districts;[7] however, they are frequently asked to determine what level of services is required to meet the EHA's minimum standards.

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[1] Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989). *See* Yearbook of Education Law 1990 at 113.

[2] Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990).

[3] 20 U.S.C. § 1401(18).

[4] 20 U.S.C. § 1401(16).

[5] 20 U.S.C. § 1401(18)(d).

[6] Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).

A federal district court held that an athletic association's rule that renders a transfer student ineligible to participate in interscholastic sports for one year interfered with a handicapped student's rights as guaranteed by the EHA.[8] The student had transferred from one high school to another in order to receive a free appropriate public education (FAPE). The athletic association had denied the student's request for an exemption from the rule and the student filed a court action. Although the district court held in favor of the student, the appeals court reversed because of the student's failure to exhaust administrative remedies under the EHA.[9] While litigation was pending the student participated in interscholastic sports pursuant to the district court's order and the athletic association later ruled that the high school was required to forfeit all games and championships in which the student participated. In the present action the district court issued a preliminary injunction prohibiting the association from interfering with the hearing officer's decision which effectively reversed the association's ineligibility ruling. The court also held that the school district could not be punished for following the court's previous order allowing the student to play.

A federal court in Arizona held that a hearing impaired student who was born in that state and lived there with family friends was entitled to attend the state's school for deaf and blind students even though her natural parents lived in Mexico. The court held that the student's United States citizenship, physical presence in Arizona, and wardship to family friends was evidence of domicile entitling her to a FAPE. Since the student was found to be in the state for legitimate reasons the court held that she was entitled to attend the state school.[10]

PROCEDURAL SAFEGUARDS

The EHA contains an elaborate system of due process safeguards to ensure that handicapped students are properly identified, evaluated, and placed according to the mandates of the Act.[11] The regulations promulgated under the EHA state that the parents or guardians of a handicapped child must be provided with the opportunity to participate in the development of an IEP for their child.[12] These regulations also require school districts to obtain parental consent prior to evaluating the child or making an initial placement.[13] Once a handicapped child has been placed, the school district must provide the parents with proper notice before it may initiate a change in placement.[14]

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[7] *Id.*

[8] Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990), *aff'd without pub. opinion sub. nom.* Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990).

[9] *See* Yearbook of Education Law 1990 at 100.

[10] Sonya C. v. Arizona School for the Deaf and Blind, 743 F. Supp. 700 (D. Ariz. 1990).

[11] 20 U.S.C. § 1415.

If the parents disagree with any of the decisions made by the school district concerning a proposed IEP or any aspect of the provision of a FAPE, they may request an impartial due process hearing.[15] Any party that is not satisfied with the final outcome of these administrative proceedings may appeal to the state or federal courts.[16] While an administrative or judicial action is pending, the school district may not change the child's placement without parental consent[17] or a court order.[18]

The courts have been empowered to review the record of the administrative hearings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence.[19] However, judges have been cautioned not to substitute their views of proper educational methodology for that of competent school authorities.[20]

Rights of Parents or Guardians

The federal district court in Connecticut held in two separate cases that parents are entitled to tape record meetings with school district personnel concerning the development of an IEP. In the first case the mother of the handicapped child had limited English proficiency and requested permission to tape record the meetings so that she could better understand and follow what transpired.[21] In the second case the child's mother could not take notes because of a disabling hand injury and the child's father could not attend the meetings due to work commitments.[22] In each case the court held that allowing parents to tape record IEP meetings allowed them to effectively participate in the process. The court noted that the EHA requires school districts to make every effort to ensure the full and meaningful participation of parents in the development of IEPs. Tape recording would help the parents understand the proceedings of the meeting and thus be equal collaborators in the formulation of the IEP.

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[12] 34 C.F.R. § 300.345.

[13] 34 C.F.R. § 300.504(b).

[14] 20 U.S.C. § 1415(b)(1)(C).

[15] 20 U.S.C. § 1415(b)(2).

[16] 20 U.S.C. § 1414(e)(2).

[17] 20 U.S.C. § 1415(e)(3).

[18] Honig v. Doe, 484 U.S. 305 (1988).

[19] 20 U.S.C. § 1415(e)(2)(C).

[20] Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).

[21] E.H. and H.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990).

[22] V.W. and R.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990).

The First Circuit Court of Appeals held that a school district may employ the services of a court reporter to supplement the official transcript of due process hearings.[23] The court found that the official tape recordings made by the state were often of such poor quality that a verbatim transcript could not be made. Allowing a school district to employ its own court reporter was held to be a reasonable means for the school district to secure its statutory right to a verbatim record of the proceedings and did not violate the student's privacy rights. The court also held that the presence of the reporter was not equivalent to opening the hearing to the public.

A federal district court in New York held that although the school district did at times violate the letter of the law concerning the procedures involved in developing IEPs, those violations did not prejudice the student or his parents in any way. The court found that in spite of the violations the parents were involved in planning and executing the student's educational program.[24] The Eleventh Circuit Court of Appeals also found that the EHA's requirements were not violated by deficiencies in the notice provided to the parents of a handicapped child since they had no impact on the parents' full and effective participation in the IEP process.[25] Since the purpose of the EHA's requirements had been fulfilled the court held that there had been no violation which required relief. The court also found that the parents' other procedural violation claims were without merit, particularly since some were actually caused by the parents or resulted from accommodations that were required because of the student's fragile condition. The Sixth Circuit Court of Appeals held that the school district's failure to provide written notice of an IEP conference was not prejudicial since oral notice had been provided and the student's mother participated in the conference.[26] Although the court noted that strict compliance with the EHA's procedural safeguards was the best way to assure enforcement of the Act's substantive provisions, it found that the error here did not result in a substantive deprivation.

The Second Circuit Court of Appeals held that the parent of a handicapped student between the ages of eighteen and twenty-one retained her procedural rights even though the student had not been determined to be incompetent.[27] The court held that the student's parent must be notified of any contemplated change in placement including the termination of services, and if the parent objected, the EHA's stay-put provision applied.

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[23] Caroline T. v. Hudson School Dist., 915 F.2d 752 (1st Cir. 1990).

[24] Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).

[25] Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).

[26] Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).

[27] Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990).

The Sixth Circuit Court of Appeals held that the parents of a handicapped student waived their right to a properly constituted IEP meeting when they refused the school district's offer to convene one.[28] The parents had met with school officials to discuss a summer program for the student but all of the required participants were not present at the meeting. The school district did not amend the student's IEP as a result of that meeting but offered to convene a properly constituted IEP meeting. The parents declined the offer and later challenged the meeting on procedural grounds.

Development of Individualized Education Programs

The EHA states that an IEP must contain statements of the student's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which the child can participate in regular education, the date of initiation and duration of services, and evaluation criteria to determine if objectives are being met.[29] The Sixth Circuit Court of Appeals upheld an IEP that did not specifically state current performance levels or the criteria that would be used to evaluate progress toward educational objectives.[30] The court held that this information was known to all concerned and stated that to hold that these technical deviations from the EHA rendered the IEP invalid would be to exalt form over substance. The court further stated that the Supreme Court's emphasis on procedural safeguards refers to the process by which an IEP is developed rather than the myriad of technical items that must be included in the written document.

Change in Placement

The Ninth Circuit Court of Appeals held that once a state educational agency decides that a placement chosen by the parents is appropriate it becomes the then current placement under the EHA.[31] The parents had prevailed in an administrative hearing and the school district appealed; however, the district court upheld the administrative decision. The appeals court held that the school district was required to maintain the parents' chosen placement pending court review.

The federal district court in the District of Columbia also ruled that the school district must comply with a hearing officer's order for the school district to maintain and fund a private placement chosen by the parents after the closing of the private school the student had been attending.[32]

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[28] Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).

[29] 20 U.S.C. § 1401(19).

[30] Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990).

[31] Clovis Unified School Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).

[32] Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).

When the student's former school ceased operation, the school district offered a public school placement but failed to execute a complete IEP. A proper IEP was not developed until mid-year at which point the hearing officer felt that it was not in the student's best interest to be transferred and ordered that the private placement be maintained for the remainder of the school year.

The Sixth Circuit Court of Appeals held that a school district did not violate the EHA's stay-put provision when it refused to maintain a student in a summer school program that had never been included in the student's IEP.[33] That same court held that the then current placement refers to the operative placement actually functioning at the time the dispute first arises, not a proposed placement that has not been implemented.[34]

Administrative Remedies

Under the EHA's due process requirement the parties must exhaust all administrative remedies before filing court action unless it is futile to do so. The exhaustion of administrative remedies principle was an issue in several cases in 1990.

Several district courts refused to decide the merits of lawsuits because the plaintiffs had failed to exhaust administrative remedies and had not shown that resort to the administrative process would have been futile or that adequate relief was not available through that process.[35] One court stated that although administrative proceedings are lengthy, they are meaningful in that they provide the courts with expert fact finding and preserve the intent of the EHA that parents and school districts work together to develop an IEP.[36] Another court also held that administrative remedies under the EHA must be exhausted even though claims under another statute or the Constitution were also filed.[37]

However, several courts also found adequate grounds to support a futility argument and allowed cases to proceed without prior administrative proceedings. The Ninth Circuit Court of Appeals held that the plaintiffs had no recourse but to seek judicial intervention after they were denied a requested due process hearing.[38] The court also found that the major

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33. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
34. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).
35. Harper v. School Admin. Dist. No. 37, 727 F. Supp. 688 (D. Me. 1989); Buffolino v. Board of Educ. of Sachem Cent. School Dist. at Holbrook, 729 F. Supp. 240 (E.D.N.Y. 1990); Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990); Waterman v. Marquette-Alger Intermediate School Dist., 739 F. Supp. 361 (W.D. Mich. 1990).
36. Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990).
37. Buffolino v. Board of Educ. of Sachem Cent. School Dist. at Holbrook, 729 F. Supp. 240 (E.D.N.Y. 1990).
38. Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988). *See* Yearbook of Education Law 1989 at 102 and 109.

issue in the case, the legislature's failure to appropriate sufficient funds, was not a problem that could have effectively been dealt with through administrative appeals. The federal district court in Arizona also held that exhaustion was not required when the defendants had failed to provide the plaintiff with meaningful access to the EHA's due process procedures.[39] The Third Circuit Court of Appeals also held that the administrative process could not have provided the student with the relief sought and was thus futile since the issues involved were purely legal, not factual.[40]

A federal district court in California held that the state's higher standard of appropriateness was the correct standard of review in administrative actions brought pursuant to the EHA.[41] The California education code requires educational programs for handicapped children that will provide them an equal opportunity to achieve their full potential commensurate with the opportunity provided to nonhandicapped students.

Court Proceedings

Several courts were asked to determine which party bore the burden of proof in special education disputes. The Sixth Circuit Court of Appeals, finding that absent procedural violations due weight and greater deference should be accorded to a school district's placement decision, held that the party challenging the terms of the IEP should bear the burden of proving that the educational placement established by the IEP is not appropriate.[42] However, the Fourth Circuit Court of Appeals held that the party challenging an administrative decision must bear the burden of proof in court proceedings.[43] A New York district court agreed, holding that the party challenging an administrative decision must prove, by a preponderance of the evidence, that the administrative findings should be set aside.[44] The court cautioned, however, that administrative findings are entitled to some degree of deference. Another federal district court held that a court may reverse a hearing officer's decision only if the court is satisfied that the challenging party has shown, by a preponderance of the evidence, that the hearing officer was wrong.[45] The Sixth Circuit Court of Appeals held that where a state has established a two-tiered review process, the federal courts are required to defer to the final administrative decision.[46]

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39. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).
40. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).
41. Pink v. Mt. Diablo Unified School Dist., 738 F. Supp. 345 (N.D. Cal. 1990).
42. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
43. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
44. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).
45. Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).
46. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).

The First Circuit Court of Appeals noted that the question of whether an IEP is appropriate is a mixed issue of fact and law and held that a district court's decision is reviewable only for clear error.[47] The court indicated that in the absence of a mistake of law the appeals court should accept a district court's resolution of questions about the appropriateness of the IEP as long as the lower court's conclusions are not clearly erroneous. The Fourth Circuit Court of Appeals held that neither a district court nor an appeals court should disturb an IEP simply because it disagreed with its content.[48] Rather, courts should defer to educators as long as the IEP meets the EHA's basic requirements. However, the court held that no deference is due where procedural errors result in the failure of school officials to make decisions regarding an IEP.

The Sixth Circuit Court of Appeals interpreted the EHA's provision that a reviewing court "shall hear additional evidence at the request of a party"[49] quite literally.[50] The court stated that in its ordinary sense "additional" means something that exists by way of addition that is joined or united with the original. The court affirmed the lower court's decision to admit additional evidence concerning less restrictive placements stating that to do so did not undercut the role of administrative expertise in the EHA process and that it was appropriate for a court to hear that evidence when a hearing officer had failed to do so. The First Circuit Court of Appeals, however, stated that a party seeking to introduce additional evidence at the district court level must provide some justification for doing so.[51] In this instance the parents had been given full opportunity to present the testimony of expert witnesses at the administrative level but had flatly refused. The appeals court ruled that the district court had not abused its discretion in precluding the testimony of the parents' expert witnesses where that testimony was deliberately withheld at the administrative level.

In a rather unusual case the Eighth Circuit Court of Appeals held that court proceedings under the EHA could be closed to the public.[52] A school district had sought a court order to enjoin a handicapped student from attending school after he brought a handgun to school. After the district court granted the student's request that the proceedings be closed to the public, a newspaper filed motions to open the courtroom and the case file. On appeal of the district court's denial, the appeals court noted that strong public policy favored the protection of the privacy of minors regarding sensitive matters and that the EHA restricted the release of information concerning handicapped students without parental consent. In order to safeguard that information the court found that it was appropriate to restrict access to the courtroom and file.

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[47] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
[48] Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
[49] 20 U.S.C. § 1415(e)(2).
[50] Metropolitan Gov't of Nashville and Davidson County, Tenn. v. Cook, 915 F.2d 232 (6th Cir. 1990).
[51] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
[52] Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8th Cir. 1990).

Standing to Sue

A New York district court held that one school district lacked standing to sue another school district to prevent it from removing a student from one of its programs.[53] The student, who resided in the plaintiff school district, had been attending a specialized program in the defendant school district under a contractual agreement between the two districts. However, when the defendants notified the student's home district that it would no longer provide those services, the plaintiff filed suit seeking to prevent the student's exclusion by claiming that the exclusion would violate the EHA's stay-put provision. The court, however, held that the EHA's safeguards are designed for the benefit of handicapped children and their parents and that the plaintiff's claim that the student's exclusion would subject it to suit from his parents was far too speculative to give it standing to sue.

Actions Under Other Statutes

The parents of a handicapped student who had received corporal punishment filed suit under 42 U.S.C. section 1983 and state law, claiming that excessive force was used in violation of the due process clause of the fourteenth amendment. The district court dismissed for failure to state a claim and the appeals court affirmed holding that adequate remedies were afforded by state law so the fourteenth amendment was not implicated.[54] The court also held that the student's special education teacher did not have any duty under state law to intervene.

The federal district court in Arizona held that a sufficient basis existed to support a constitutional damages claim within the context of an EHA claim for a physically handicapped student who was denied admission to her neighborhood school because it could not accommodate her wheelchair.[55] The student eventually enrolled in the school pursuant to a court order but graduated two years later than she otherwise should have. Her suit claimed violations of the EHA, section 504 of the Rehabilitation Act, and the fifth amendment.

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[53] Board of Educ. of Seneca Falls Cent. School Dist. v. Board of Educ. of Liverpool Cent. School Dist., 728 F. Supp. 910 (W.D.N.Y. 1990).

[54] Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990).

[55] Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

PLACEMENT

The EHA's regulations require school districts to "insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services."[56] That continuum must range from placement within the regular classroom to a private residential facility and must also include homebound instruction. However, the placement chosen for any given handicapped student must be in the least restrictive environment (LRE) appropriate for that child.[57] The placement must be made at public expense and must meet state educational standards.[58] Every placement must be reviewed at least annually and revised if necessary.[59] The Supreme Court has held that an appropriate placement is one that is developed in compliance with the EHA's procedures and is reasonably calculated to enable the child to receive educational benefits.[60] Although states must adopt policies that are consistent with federal law, they are free to provide greater benefits to handicapped children. If a state does establish standards that are higher than those in the EHA, the courts incorporate those higher standards into the Act when determining the appropriateness of the IEP.[61]

Appropriate Educational Program

One court found that a school district's noncompliance with the EHA's procedures caused the IEP to fail the first prong of the Supreme Court's appropriateness test. The Fourth Circuit Court of Appeals held that a school district's proposed IEP was not appropriate since it was not developed according to the time-lines established by state law.[62] The school district's procedural lapse and delay in evaluating the student resulted in an IEP not being in place when it should have been.

Most courts, however, do not find minor procedural flaws to be fatal as long as they do not result in harm to the student. The First Circuit Court of Appeals held that procedural flaws do not automatically render an IEP defective.[63] In order to set aside an IEP that is otherwise appropriate there must be some rational basis to believe that the procedural errors compromised the student's right to an appropriate education, seriously interfered with the parents' right to participate in the process, or caused a deprivation of educational benefits according to the court. The Eleventh Circuit Court of Appeals and a district court in New York also held that deficiencies that had no impact on the parents' full and effective participation in the IEP process did not render the IEP inappropriate.[64]

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[56] 34 C.F.R. § 300.553(a).

[57] 34 C.F.R. § 300.550.

[58] 20 U.S.C. § 1401(18).

[59] 34 C.F.R. § 300.552(a)(1).

[60] Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).

[61] *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 (3d Cir. 1985); Yearbook of School Law 1986 at 131.

[62] Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).

[63] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

An IEP cannot be held to be inappropriate due to procedural flaws that are either caused by the parents or are due to accommodations that are made specifically for the parents. The Sixth Circuit Court of Appeals held that a handicapped student's father could not claim that the school district violated the EHA by not having an IEP in place at the beginning of the school year when the district was complying with his request to suspend services for the first marking period.[65] The Eleventh Circuit Court of Appeals held that the parents' procedural violation claims were without merit since delays in formulating an IEP were caused by the parents and the school district's reliance on a hospital evaluation to develop the IEP was due to the fact that the student was too emotionally fragile to be tested by the school district's personnel.[66]

Determining whether a proposed IEP will confer educational benefit on a given handicapped student is a difficult task. If the student has a significant educational history, however, courts are often able to use past performance as a guide to help determine whether a proposed IEP is likely to confer educational benefit. The Fourth Circuit Court of Appeals refused to reverse a district court's determination that an IEP was reasonably calculated to confer educational benefit after it had been shown that the student made great improvement under it.[67] A district court in New York held that an examination of the student's progress in the fifth and sixth grades demonstrated that the IEPs were reasonably calculated to enable him to receive educational benefit.[68] The court noted that the student's less than outstanding performance was not due to an inadequate educational program, but rather, was attributable to the fact that the student did not always give his best effort, failed to complete homework and class assignments, and often talked with classmates during lessons. A federal district court in Texas also held that the failure or success of an educational program is not something that can be judged on the theory that if the child did not succeed the school must have failed to do its job.[69]

Two district courts have found proposed IEPs to be inappropriate when the evidence indicated that the students had not progressed under similar programs. A Tennessee court found that a student had deteriorated under a homebound program and that there was no evidence to indicate that it would be different under another proposed homebound program.[70] A Pennsylvania court held that a special class placement in a public school building was not appropriate since the student was not deriving any educational benefit and was so disruptive as to interfere with the education of other students.[71]

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[64] Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990); Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).

[65] Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990).

[66] Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).

[67] Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).

[68] Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).

[69] McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386 (S.D. Tex. 1990).

The Fourth Circuit Court of Appeals held that in-home habilitation services requested by an autistic student's parents were not required since the record showed that the student had made educational progress without the requested services and the EHA required no more.[72] The court further held that the school district's proposed IEP also met the more stringent North Carolina standard that schools must provide a handicapped student with an equal opportunity to learn if that is reasonably possible, by ensuring that the student had an opportunity to reach his full potential commensurate with the opportunity provided to other students.

The First Circuit Court of Appeals also considered Massachusetts' higher standard that special education programs should assure the maximum possible development of the child in determining that a school district's IEP was appropriate.[73] The court found that the school district could provide a well rounded program with related services keyed to the student's specific handicaps and that the school district's faculty was more experienced and better credentialed than that of a private school chosen by the parents.

A California district court held that the state's standard, which required an educational program for a handicapped student that provided him with an equal opportunity to achieve his potential commensurate with the opportunity provided to nonhandicapped pupils, was the correct standard of review in EHA actions.[74]

A federal district court in Kentucky held that the state failed to provide a continuum of placement alternatives for visually impaired students as required by the EHA.[75] In the class action suit filed on behalf of a blind, multihandicapped child, and other similarly situated students who had been denied admission to the state school for the blind, the court held that the state had to either educate severely multihandicapped students at the school or develop some other program for them.[76]

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[70] Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

[71] Liscio v. Woodland Hills School Dist., 734 F. Supp. 689 (W.D. Pa. 1989), *aff'd without pub. opinion*, 902 F.2d 1561 (3d Cir. 1990).

[72] Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

[73] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

[74] Pink v. Mt. Diablo Unified School Dist., 738 F. Supp. 345 (N.D. Cal. 1990).

[75] Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990).

[76] *Id.*

Least Restrictive Environment

Congress expressed a preference in the EHA that handicapped students are to be educated with nonhandicapped students to the maximum extent appropriate and that removal from the regular classroom is to occur only to the extent necessary to provide special educational services. However, mainstreaming is not appropriate for all handicapped students and the courts are required to balance the need for services in a specialized environment with the benefits to be gained from mainstreaming. Several courts in 1990 wrestled with this issue.

A Pennsylvania district court approved the placement of a multihandicapped student in a class for students with dual handicaps that was located in a segregated special education center with mainstreaming in nonacademic subjects in a public school.[77] The court found that a less restrictive placement in a special education class located within a public school building was not appropriate since the student had not derived any educational benefit from it and had disrupted that class to the extent that he interfered with the education of other students during an interim placement there. However, the court found that the student benefitted from his interaction with nonhandicapped peers in extracurricular activities and approved a plan that called for some mainstreaming. That decision was affirmed by the Third Circuit Court of Appeals without a published opinion.

The First Circuit Court of Appeals held that the student's general capabilities and whether the IEP addresses the student's basic needs must be considered along with the LRE mandate when courts determine the appropriateness of a proposed placement.[78] The court found that the desirability of mainstreaming must be weighed with the mandate for educational improvement and that the courts must balance the benefits to be gained or lost on both sides of the fulcrum. The court approved a public school placement over a private school program for the student who suffered from several disabilities.

The Sixth Circuit Court of Appeals held that although the EHA established a mainstreaming policy under which handicapped children are to be educated with nonhandicapped children to the maximum extent appropriate, it did not preclude a homebound placement for a severely multihandicapped child.[79] However, an Alabama district court held that a residential placement requested by an emotionally handicapped student's mother was less restrictive than the school district's proposals for homebound instruction or individual instruction in an isolated room in an administration building.[80] The court found that the school district's proposals would not offer the student any contact with other children during the school day and would not facilitate his eventual return to a regular classroom setting; but rather, would allow his social interaction skills to regress.

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[77] Liscio v. Woodland Hills School Dist., 734 F. Supp. 689 (W.D. Pa. 1989), *aff'd without pub. opinion*, 902 F.2d 1561 (3d Cir. 1990).

[78] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

[79] Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).

[80] Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990).

Private Facilities

The Ninth Circuit Court of Appeals upheld a placement in a residential school and psychiatric hospital for an emotionally disturbed student who had a history of assaultive behavior and psychiatric hospitalization.[81] The school district had argued that the facility in question was a psychiatric hospital that provided exempted medical services. The court, however, ruled that it was a boarding school that had the capacity to provide medical services that may be necessary. The court was persuaded by the fact that the facility was a state accredited educational institution.

A federal district court in Tennessee approved a residential rehabilitation facility placement requested by a handicapped student's parents over the school district's proposal for a homebound instruction program.[82] The court noted that the student's condition worsened and her behavior was intolerable in the family home during a previous homebound program. Since there was no evidence to indicate that anything would be different under the proposed homebound program, the court held that it did not meet the EHA's standards. Since the record indicated that the student had made progress in the residential program, the court found that it offered the only available appropriate placement. The court also found that the rehabilitation program qualified as special education and related services under the EHA as it provided many of the services contemplated by the Act. An Alabama district court approved a residential placement after determining that an emotionally handicapped student's behavior problems were left untreated by the school district to the point where they had deteriorated to a level of intensity requiring consistent and systematic round-the-clock behavioral training.[83] The court also found the residential program to be less restrictive than homebound instruction. The First Circuit Court of Appeals held that a public school placement was preferable to a private school placement after determining that the school district could implement a more appropriate and well rounded IEP, could provide more related services, and had more experienced and better credentialed faculty than the private school.[84] The Eleventh Circuit Court of Appeals also approved a school district's proposed IEP after finding that it provided for more than the student's minimal educational needs and that a residential program requested by the parents could be counterproductive to the student's development.[85]

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[81] Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990).

[82] Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

[83] Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990). *See* n. 80 and accompanying text.

[84] Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

Extended School Year

The Sixth Circuit Court of Appeals held that a developmentally delayed student with autistic behaviors did not require an extended school year program.[86] The court held that the regression standard enunciated in earlier cases[87] was best interpreted not to require absolutely that it be demonstrated that the student regressed in the past to the detriment of educational progress in order to prove the need for an extended school year program. Instead, where such data are not available, a need could be shown by expert opinion based on a professional individual evaluation. The court stated that those requesting the extended school year program were required to show that it was necessary to permit the child to benefit from the instructional program. The court further held that if the child benefitted meaningfully from a regular school year program, the extended school year program would not be required unless those benefits would be significantly jeopardized without the extended school year program. In the case at bar, the court found that the student would benefit from the extended school year program but that it was not necessary to preserve the benefits he received from his school year program.

RELATED SERVICES

The EHA mandates that handicapped students are to be provided with related or supportive services if such services are required to assist the students in benefitting from their special education.[88] The Act specifically indicates that related services include such developmental, corrective, or supportive services as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation, counseling services, medical services, and early identification and assessment.[89] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The Supreme Court has held that related services need to be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.[90]

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[85] Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).

[86] Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).

[87] *See e.g.*, Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd sub nom.* Battle v. Commonwealth of Pa., 629 F.2d 269 (3d Cir. 1980).

[88] 20 U.S.C. § 1401(17).

[89] *Id.*

The Fourth Circuit Court of Appeals held that since the record showed that an autistic student had made educational progress without in-home habilitation services requested by his parents, those services were not required.[91] The court also held that the requested services, which were aimed at controlling the student's behavior, did not fall under either the federal or state definitions of special education and related services.

In two separate cases the Ninth Circuit Court of Appeals was called on to determine if psychiatric facilities were educational or medical in nature. Taken together these two decisions illustrate how the reasons for the placement and the primary services provided at the facility influence the final determination. In the first case the court held that the psychiatric hospital was a medical facility and that the care and treatment that a child received in such a hospital could be compared to the care and treatment received when one is hospitalized for a physical illness.[92] The court found that the student had been hospitalized for psychiatric or medical reasons and that the services she received there were for treating an underlying medical condition. The court also found that room and board costs were medically related, not educationally related, since the hospital itself did not provide educational services. In the second case the court upheld a placement in a residential school and psychiatric hospital chosen by an emotionally disturbed student's parents.[93] In this second case the court found that the facility had the capacity to provide medical services, and that the placement was made primarily for educational, rather than medical, reasons and was not made in response to a medical crisis.

A federal district court in Tennessee also held that the limited medical services a student received in a residential rehabilitation program could not be used to characterize the entire program as a medical program.[94] The court found that the medical services that were provided were related services since their primary purpose, which was to monitor and adjust medication, was diagnostic and evaluative. The Fourth Circuit Court of Appeals would not allow reimbursement to the parents of a handicapped student for medically related aspects of a placement in a psychiatric facility but did allow reimbursement for educational and counseling services provided to the student while he was in the hospital.[95]

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[90] Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

[91] Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

[92] Clovis Unified School Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).

[93] Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990).

[94] Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

[95] Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).

DISCIPLINE

The EHA does not contain any provisions that specifically refer to discipline; however, disciplinary sanctions applied to handicapped students have been the issue in numerous cases in past years. These cases indicated that the EHA's change in placement and status quo provisions were applicable to the disciplinary process. The Supreme Court has emphatically stated that handicapped students cannot be expelled for disciplinary reasons, where the offending behavior is a manifestation of the handicap.[96] However, they may be temporarily suspended and are subject to other normal disciplinary sanctions. This decision seems to have significantly lessened the litigation over disciplinary issues as very few cases have been reported since the Court's opinion was issued.

In a 1989 case that was reported too late for inclusion in the *Yearbook of Education Law 1990*, a New York Family Court held that the Supreme Court's *Honig* decision did not affect truancy proceedings and did not deprive the court of subject matter jurisdiction.[97] The respondent had claimed that the *Honig* decision divested the Family Court of jurisdiction over truancy proceedings against handicapped children.

REMEDIES

When a school district fails to provide a handicapped student with an appropriate placement the courts are empowered to grant such relief as the court determines is appropriate.[98] Often the relief granted involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. According to the Supreme Court, school districts may be required to reimburse parents for any unilaterally obtained private educational services if they prevail in having their chosen placement determined to be appropriate.[99] Awards of compensatory educational services have been made in situations where the parents did not have the means to obtain the necessary services while litigation was pending.

Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[100] which allows parents who prevail in an EHA suit against the school district to recover their legal expenses. Since the passage of that amendment, reimbursement of attorney fees has been a frequently litigated issue.

The eleventh amendment to the Constitution protects the states from lawsuits in the federal courts; however, Congress may abrogate the states' immunity when it enacts legislation if it makes its intention to do so known in clear and unmistakable language within the statute itself.[101] The Supreme Court has held that Congress did not abrogate the states' sovereign immunity when it enacted the EHA.[102]

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[96] Honig v. Doe, 484 U.S. 305 (1988).

[97] *In re* Thomas W., 560 N.Y.S.2d 227 (Fam. Ct. 1989).

[98] 20 U.S.C. § 1415(e)(2)(C).

[99] Burlington School Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 (1985).

[100] 20 U.S.C. § 1415(e)(4)(B) *et seq.*

Damages

The Second Circuit Court of Appeals held that employees of a state department of mental health could not be held personally liable for damages in a lawsuit claiming that they had violated a handicapped child's constitutional and statutory rights.[103] The court determined that several issues were not clearly established including the contentions that the employees reasonably could have understood that their alleged actions violated the child's rights under the EHA or that procedural violations occurred. In a separate case that same court also held that officials of a state department of children and youth services were entitled to qualified immunity because at the time they discharged a student from a mental health center it had not been clearly established that such a decision was covered by the EHA's procedural protections.[104]

An Arizona district court held that a sufficient basis existed to support a constitutional damages claim within the context of an EHA claim in a case where a handicapped student had been denied meaningful access to the EHA's due process procedures.[105] The court ruled, however, that the plaintiff must prove at trial that the defendants' conduct amounted to a constitutional violation beyond an EHA violation. A district court in Michigan, however, held that monetary damages are not available under the EHA.[106]

Tuition Reimbursement

A federal district court in Tennessee awarded tuition reimbursement to the parents of a severely handicapped student for a unilaterally made placement in a residential rehabilitation facility for brain-injured victims.[107] Reimbursement was ordered from the date the parents' private insurance benefits ceased paying for the program until the day the student's entitlement to services under the EHA ended. The court found that a homebound instruction program offered by the school district was not an appropriate placement. The District Court for the District of Columbia held that the parents' decision to enroll their handicapped child in a private school was proper since the school district had failed to offer a proper IEP by the start of the school year. A hearing officer had held that a mid-year transfer to the program proposed by the district was not in the student's best interests. The court, therefore, ordered tuition reimbursement for the entire school year.[108]

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[101] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

[102] Dellmuth v. Muth, 109 S. Ct. 2397 (1989).

[103] P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990).

[104] Christopher P. v. Marcus, 915 F.2d 794 (2d Cir. 1990).

[105] Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

[106] Waterman v. Marquette-Alger Intermediate School Dist., 739 F. Supp. 361 (W.D. Mich. 1990).

[107] Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

The South Dakota federal district court awarded reimbursement for privately obtained occupational therapy services after finding that the school district was dilatory in not promptly resolving objections the parents raised concerning the district's occupational therapy program.[109] The fact that the school district eventually agreed to fund the private therapy was an indication that those were the appropriate services according to the court's ruling.

The Fourth Circuit Court of Appeals held that reimbursement was appropriate if the parents could show that a psychiatric hospital placement where the student also received educational, counseling, and therapy services was proper under the EHA.[110] The court emphasized, however, that medically related expenses were not reimbursable.

Several courts denied reimbursement after finding that the school district had offered and had the capacity to implement an appropriate IEP.[111]

Compensatory Services

The Second Circuit Court of Appeals held that procedural violations which caused a student to be excluded from an educational placement until he was twenty-one entitled the student to compensatory services.[112] The Third Circuit Court of Appeals held that a profoundly retarded student was entitled to compensatory services for the inappropriate education he received while the school district failed to find a proper placement for him.[113] Evidence existed that the school district did not aggressively seek an appropriate placement for a thirty month period while the student remained on homebound instruction. In awarding the compensatory services, the court indicated that such awards are an appropriate remedy for

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108. Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).
109. Rapid City School Dist. v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990).
110. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
111. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990); Matta v. Board of Educ.—Indian Hills Exempted Village Schools, 731 F. Supp. 253 (S.D. Ohio 1990); Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990); Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
112. Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990).
113. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

students whose parents cannot afford to provide them with an alternative education while a dispute is pending.

However, a federal district court in Tennessee held that compensatory services were not warranted for a student who had remained on homebound instruction because the school district's actions had not denied the student access to a residential facility that was eventually determined to be appropriate.[114] During the two years the student remained on homebound instruction, neither the parents nor the school district were aware of the residential program.

Attorney Fees

In past years much of the attorney fees litigation involved the question of whether the HCPA authorized reimbursement of legal expenses when the dispute was settled at the administrative hearing level. Although the majority of the federal appeals courts had held that attorney fees awards were authorized for administrative proceedings, a split among the circuits developed in 1989 when the District of Columbia Circuit Court of Appeals held that awards were not authorized for representation at that level.[115] However, in 1990 the appeals court, sitting *en banc*, reversed its previous decision.[116] In the second decision the court held that construing the HCPA to authorize an award to a parent who prevailed at the administrative level best comported with the language of the statute. Furthermore, the court found that an examination of the legislative history removed "any doubt that Congress intended parents who prevailed in EHA administrative proceedings to be able to recover their attorney fees."[117] Other courts also held that attorney fees were available at the administrative level.[118]

Several cases in 1990 dealt with the issue of what constitutes a prevailing party. The Fifth Circuit Court of Appeals held that a plaintiff is not a prevailing party unless the resolution of the dispute altered the legal relationship of the parties in a manner Congress sought to promote in the HCPA.[119] The federal district court in New Jersey held that the parents were the prevailing party since they obtained most of the relief they sought.[120] The court also held that the parents were not deprived of their prevailing party status just because they reached a settlement prior to an administrative hearing. They also were not collaterally estopped from seeking a fees award even though fees were not included in the settlement agreement since all parties understood that fees would be discussed at the appropriate time. The district court in South Dakota awarded attorney fees after determining that the parents were without question the prevailing party.[121] In *dicta* the court questioned the wisdom of the school district in incurring over $25,000 in legal expenses to contest a tuition reimbursement award of $861.

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[114] Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

[115] Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989). *See* Yearbook of Education Law 1990 at 112-13.

[116] Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990).

[117] *Id.* at 172.

[118] McSombodies (No. 2) v. San Mateo City School Dist., 897 F.2d 975 (9th Cir. 1990); E.P. v. Union County Regional High School Dist., 741 F. Supp. 1144 (D.N.J. 1989).

[119] Angela L. v. Pasadena Indep. School Dist., 918 F.2d 1188 (5th Cir. 1990).

[120] E.P. v. Union County Regional High School Dist., 741 F. Supp. 1144 (D.N.J. 1989).

An Indiana district court reduced a requested award after determining that although the parents were the prevailing party, their counsel protracted the hearing in an extensive and expansive fashion after the parents had achieved most, if not all, of their objectives.[122] The court also denied a request to award fees to the plaintiff for acting as a paralegal. A New York district court held that fees could not be recovered for unsuccessful claims which were distinct in all respects from successful claims.[123] Since the court found that the plaintiff was seeking fees only for issues related to a successful attempt to gain compensatory services, fees were awarded. The Second Circuit Court of Appeals held that granting a temporary restraining order without addressing the merits of the case was not sufficient to give a plaintiff prevailing party status.[124]

The Eighth Circuit Court of Appeals held that if special circumstances were found to exist in a case, the parent would not be entitled to compensation for the legal fees she incurred even though her rights under the EHA were violated.[125] The school district had claimed that it should not be required to pay attorney fees resulting from a hearing officer's erroneous refusal to consider the parent's initial claim. The First Circuit Court of Appeals held that the school district was entitled to reimbursement of attorney fees under Appellate Rule 38[126] after it determined that the parents had engaged in tactics throughout the proceedings that led to undue delays and had failed to cooperate in negotiations to settle the dispute.[127] However, a New York district court denied a school district's request for attorney fees after finding that both parties had proceeded in good faith.[128] The school district claimed that the parents brought the action in bad faith.

State Immunity

The Ninth Circuit Court of Appeals held that the eleventh amendment prohibits an award against the state for restitution of benefits that were wrongfully withheld in the past but did not prevent a prospective order for the state to comply with the EHA.[129] The Third Circuit Court of Appeals held that a school district did not acquire the state's eleventh amendment immunity in special education suits simply because it received a significant amount of state funding for those programs.[130] The federal district court in Arizona held that sovereign immunity does not apply when officials act in an unconstitutional manner.[131]

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[121] Rapid City School Dist. v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990).

[122] Howey v. Tippecanoe School Corp., 734 F. Supp. 1485 (N.D. Ind. 1990).

[123] Burr v. Sobel, 748 F. Supp. 97 (S.D.N.Y. 1990).

[124] Christopher P. v. Marcus, 915 F.2d 794 (2d Cir. 1990).

[125] Independent School Dist. No. 623, Roseville, Minn. v. Digre, 893 F.2d 987 (8th Cir. 1990).

[126] FED R. APP. p. 38.

[127] Caroline T. v. Hudson School Dist., 915 F.2d 752 (1st Cir. 1990).

[128] Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).

OTHER EHA ISSUES

The Second Circuit Court of Appeals held that Medicaid was responsible for nursing services provided in a school setting to a handicapped child who required twenty-four hour per day nursing care.[132] The court stated that it was generally understood that private duty nursing is "setting independent" and refers to a level of care rather than a location where it can be performed. Furthermore, the court noted that if the nurse were not allowed to accompany the student to school, the child would be confined to home and the state would be required to provide a home tutor. This would result in a greater total expenditure of public funds.

The EHA includes provisions that ensure that federal funds received under the Act are used to defray the excess costs of educating handicapped children and to supplement or increase the amount funded by the state for this purpose.[133] A school district in Washington adopted a program that changed the way it delivered special education services, resulting in a reduction in special education expenditures. A United States Department of Education audit concluded that federal funds had been used to supplant state funds in violation of the EHA after the program change. The Ninth Circuit Court of Appeals held that the EHA required a maintenance of fiscal effort even if this required a reallocation of funds.[134] If costs decline, the court stated that federal funds can be used to fund new programs that the district could not otherwise afford. According to the court only two exceptions to the maintenance of expenditure requirement exist: when there is a decrease in enrollment or if there had been unusual expenditures in the previous year. The court also held that the Department of Education was not incorrect in counting the actual number of students rather than full time equivalents for purposes of a decrease in expenditure calculation.

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[129] Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988).

[130] Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

[131] Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

[132] Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990).

[133] 20 U.S.C. § 1414(a)(2)(B).

[134] State of Washington v. United States Dep't of Educ., 905 F.2d 274 (9th Cir. 1990).

STATE LAWS

The Sixth Circuit Court of Appeals held that an Ohio law which indicates that a school district is to provide home instruction to handicapped children who cannot be transported to school did not imply that home education may not be provided if the child is capable of being transported to school.[135] The court held that the student's IEP, which called for home instruction, was appropriate.

A federal district court in California held that a school building is a place of public accommodation subject to the provisions of a statute allowing access to service dogs.[136] The court found that public schools serve a significant segment of the population for whom attendance is mandatory and are thus places of public accommodation.

A state appellate court in New York held that a student with Down's Syndrome who had lived all his life in a "family home at board" was a resident of the school district in which the home was located.[137] The court found that the student was entitled to a tuition free education in that district even though the child's natural parents had moved out of state. A New York state trial court dismissed a suit brought by one school district seeking to collect the expenses of educating a handicapped child from another school district on the grounds that the one year statute of limitations applicable in such actions had passed.[138]

The Supreme Court of Illinois reversed the lower courts' award of interest on a tuition reimbursement award to the parents of a handicapped child.[139] The lower courts had awarded tuition reimbursement, but the school district failed to pay the award promptly and the student's mother sought interest on the late payment. However, the high court stated that the language in the state statute authorizing interest payments did not contain a sufficiently clear expression by the state legislature to waive the state's sovereign immunity.

The Commonwealth Court of Pennsylvania held that a student with spina bifida who was paralyzed from the waist down was exceptional under state law.[140] The court awarded compensatory physical and occupational therapy services after having found that the school district had failed to provide the student with an appropriate education.

The Ninth Circuit Court of Appeals found that under Oregon Law the financial responsibility for funding the education of mentally retarded students who attended a private facility rested with the state.[141] The court held that the state could provide the funding in any manner it saw fit, but could not fail to provide the funds necessary to meet its responsibility.

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[135] Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).

[136] Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947 (E.D. Cal. 1990).

[137] Catlin by Catlin v. Sobol, 553 N.Y.S.2d 501 (App. Div. 1990).

[138] Board of Educ. of Katonah-Lewisboro School Dist. v. Board of Educ. of Carmel Cent. School Dist., 549 N.Y.S.2d 322 (Sup. Ct. 1989).

[139] *In re* Walker, 546 N.E.2d 520 (Ill. 1989).

[140] Pittsburgh Bd. of Educ. v. Commonwealth, Dep't of Educ., 581 A.2d 681 (Pa. Commw. Ct. 1990).

DISCRIMINATION UNDER the REHABILITATION ACT, SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[142] Section 504 effectively prohibits any recipient of federal funds from discriminating against handicapped persons in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools. For that reason this section includes several cases that did not arise in an educational context, but which contain legal principles that are applicable to educational programs that receive federal funds.

Students

Elementary and Secondary. Handicapped students at the elementary and secondary level have rights under both the EHA and section 504. For that reason many lawsuits state claims under both statutes. Often the claims stated under one statute are identical or similar to claims stated under the other; however, sometimes distinct claims are raised under section 504. The Eleventh Circuit Court of Appeals held that since a student's section 504 claims were identical to EHA claims that had been found to be without merit, the court did not need to address the section 504 claims.[143] Similarly, the Sixth Circuit Court of Appeals held that since the denial of an extended school year program had been determined to be proper under the EHA, there was nothing in the record to suggest that its denial was discriminatory under the Rehabilitation Act.[144]

A Texas district court held that there was no evidence to support a discrimination claim in the case of a handicapped student who alleged that the school district failed to provide him an appropriate education.[145] The court found that the facts failed to support a claim that the student was treated differently from other handicapped children. However, the Second Circuit Court of Appeals held that the Rehabilitation Act does not require that all handicapped individuals be provided with identical benefits.[146] In denying a discrimination claim under section 504 the court stated, "[t]he requirement that professional judgment be exercised is not an invitation to a court reviewing it to ascertain whether in fact the best course of action was taken."[147] The Fourth Circuit Court of Appeals held that section 504 was designed to prevent discrimination against the handicapped, not to impose an affirmative obligation on recipients of federal funds.[148] In denying the parents' request for in-home habilitation services for an autistic student the court found that the parents' claims under section 504 had no merit.

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[141] Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988).

[142] 29 U.S.C. § 794.

[143] Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). *See* nn. 25, 66, & 85 and accompanying text.

[144] Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990). *See* n. 86 and accompanying text.

The federal district court in Arizona held that proof of discriminatory intent is not necessary to state a claim under section 504.[149] The court found that school officials' failure to act to correct architectural barriers that prevented a physically handicapped student from attending her neighborhood school suggested a disparate impact which was sufficient for a section 504 claim. The Second Circuit Court of Appeals held that compensatory educational services were an appropriate remedy when section 504 rights were used to enforce EHA rights.[150] Procedural violations under the EHA had caused the student to be excluded from an educational placement. A Michigan district court held that claims that a handicapped student was not being provided the proper amount of services nor provided services in the proper manner stated an actionable claim under section 504.[151]

In an interesting twist a district court in Kentucky held that a student who had been denied admission to the state's school for the blind was not otherwise qualified under section 504 because he did not meet the requirement that he must be classified as at least trainable mentally retarded in order to attend the school.[152] The court found that in order to serve the student properly the school would have to hire additional staff and modify the mission of the institution, requirements which went beyond a reasonable accommodation. However, referring to the EHA's requirement that states must provide a continuum of placements for handicapped children, the court indicated that some children who may not meet the school's criteria may need to be placed there if that was the only way they could be provided with an appropriate education.

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[145] McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386 (S.D. Tex. 1990). *See* n. 69 and accompanying text.

[146] P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990).

[147] *Id.* at 1043.

[148] Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

[149] Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

[150] Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). *See* nn. 27 & 112 and accompanying text.

[151] Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990).

[152] Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990). *See* n. 76 and accompanying text.

A California district court held that a school district's refusal to admit a handicapped student's service dog violated section 504.[153] The court stated that as long as the means by which a handicapped person addressed her circumstances were reasonable, section 504 protected those means from scrutiny and prohibited discrimination against the person on the basis of those means. The court found that by excluding the service dog, school officials effectively prevented the student from addressing her handicap in school in the same manner as she did elsewhere.

The Second Circuit Court of Appeals affirmed in part a district court ruling that the hearing impaired parents of nonhearing impaired students were entitled to the services of a sign language interpreter at certain school functions.[154] The court found that the parents were otherwise qualified for parent oriented activities offered by the school district, but were unable to participate in them due to their inability to effectively communicate. The court stated that the parents were not excluded from the protections of section 504 simply because they were parents and not students.

The Eleventh Circuit Court of Appeals vacated an order of the district court which had adopted a magistrate's findings that a student with hepatitis B was an otherwise qualified handicapped individual who had been excluded from school solely because of his handicap.[155] The district court's preliminary injunction readmitting the student to school was vacated because the district court failed to conduct a *de novo* review of the magistrate's findings.

A district court in Tennessee issued a preliminary injunction under the EHA and section 504 prohibiting a high school athletic association from interfering with a hearing officer's order which allowed a handicapped transfer student to participate in interscholastic sports.[156] The court found that the association was a state actor and acted under color of state law when it declared that the student, who had transferred from one high school to another in order to receive special education services, was not exempt from a rule that prohibited transfer students from participating in extracurricular activities for one year. The decision was affirmed by the Sixth Circuit Court of Appeals without a published opinion.

Higher Education. The Eleventh Circuit Court of Appeals held that the failure of a university to provide sign language interpreters or auxiliary aids to hearing impaired students violated section 504 since access to the benefit of some courses was eliminated without these services.[157] The court further held that the Civil Rights Restoration Act of 1987[158] allowed the application of section 504 to noncredit and nondegree courses. The court also held that the university's policy of providing handicapped accessible transportation for only four hours a day violated section 504 because it was not equivalent to or as effective as the transportation provided to nonhandicapped students who had access to transportation twelve hours per day.

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[153] Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947 (E.D. Cal. 1990).

[154] Rothschild v. Grottenthaler, 907 F.2d 286 (2d Cir. 1990). *See* Yearbook of Education Law 1990 at 118.

[155] Jeffrey S. v. State Bd. of Educ. of Ga., 896 F.2d 507 (11th Cir. 1990).

[156] Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990); *aff'd without pub. opinion sub nom.*, Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990). *See* n. 8 and accompanying text and Yearbook of Education Law 1990 at 100.

The district court in the District of Columbia dismissed a damages claim by a student who alleged that he had been subjected to harassment and embarrassment when information about a positive test for AIDS was leaked to unauthorized faculty and staff.[159] The court held that section 504 damages were limited to equitable relief only.

A New York district court dismissed a discrimination claim by a graduate student with cerebral palsy who had been terminated from a degree program.[160] The student had been terminated from the program after twice failing the qualifying examinations in accordance with university policy allowing two attempts to pass. The court held that the student had not offered any evidence of discriminatory intent on the university's part and that she had been terminated as the result of her unsatisfactory academic performance.

Employees

Discrimination Claims. The Tenth Circuit Court of Appeals has held that a private corporation did not fall within the ambit of section 504 simply because it contracted with a government agency.[161] The court ruled that a governmental contract does not convey financial assistance when services are provided at fair market value. The court also held that the Civil Rights Restoration Act of 1987,[162] which amended section 504 to ban discrimination in all operations of a college, university, or other postsecondary institution, could not be applied retroactively. The case arose when an applicant was denied a security inspector's position because he had vision in only one eye.

The Ninth Circuit Court of Appeals held that two totally blind employees of the state commission for the blind, who had lost their jobs due to a reorganization, were entitled to a jury trial under the seventh amendment.[163] The employees claimed that the reorganization violated their rights under section 504. The court held that since they were seeking relief in the form of compensatory damages that were not merely incidental to available injunctive relief, they were entitled to the jury trial. The court also ruled that the employees were not required to show that they were excluded from a newly created position solely by reason of their handicap since they claimed they were rejected due to discrimination on the basis of an impermissible factor. The burden of proof thus shifted to the commission to show that the employees were rejected for legitimate, nondiscriminatory reasons.

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[157] United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).
[158] 29 U.S.C. § 794(b)(2).
[159] Doe v. Southeastern Univ., 732 F. Supp. 7 (D.D.C. 1990).
[160] Villanueva v. Columbia Univ., 746 F. Supp. 297 (S.D.N.Y. 1990).
[161] DeVargas v. Mason and Hanger—Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990).
[162] 29 U.S.C. § 794(b)(2).

The federal district court in Kansas held that a former high school principal, who had lost his position when the school board voted to consolidate the positions of elementary and high school principals into one, failed to state a genuine issue of material fact regarding whether his status as a recovering alcoholic was the sole reason for his contract nonrenewal.[164] The school board awarded the contract for the consolidated position to the former elementary principal who was certified for grades K-12. The former high school principal was not certified for all grades covered by the consolidated position.

A New York district court upheld a jury award of $100,000 to a former bus driver/custodian after finding that the school district discriminated against him in violation of section 504 because of his physical handicap.[165] The court concluded that there was adequate evidence to support the jury's award, but noted that the evidence was barely sufficient. The district court for the District of Columbia held that an employee of the Department of Health and Human Services with multiple sclerosis who had filed three discrimination claims alleging that she was denied a promotion, not allowed to work at home, and finally terminated because of her handicap, failed to substantiate those claims.[166] The court found that she had failed to provide medical evidence that would substantiate her claims that she was unable to commute to work, that her illness was worsening, or that the only reasonable accommodation would be permission to work at home. The court further found that she did not meet the minimum qualifications for promotion and that her performance had deteriorated to an unacceptable level.

Handicapped Persons. In order to be considered a handicapped person under section 504, a claimant must have an impairment which substantially limits one or more major life activities, have a record of such an impairment, or be regarded as having such an impairment.[167] The Second Circuit Court of Appeals held that an applicant for a position with a police department was not a handicapped person under section 504 due to personality traits that rendered him unsuitable to be a police officer. A routine psychological examination indicated that the applicant showed poor judgment, poor impulse control, and irresponsible behavior. The court held that these personality traits were commonplace, did not rise to the level of an impairment, and did not amount to a mental condition which substantially limited a major life activity. The court further held that being declared unsuitable for a police officer's position was not a substantial limitation of a major life activity.[168]

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[163] Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990).

[164] Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1990).

[165] Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1989).

[166] Langon v. United States Dep't of Health and Human Servs., 749 F. Supp. 1 (D.D.C. 1990).

Otherwise Qualified Individuals. The Supreme Court has held that an otherwise qualified person is one who can meet all of the employment requirements in spite of the handicap.[169] The Ninth Circuit Court of Appeals held that an emotionally handicapped clerk typist who was dismissed after it was discovered that she did not meet the minimum speed qualifications for the position was not otherwise qualified.[170] The court also found that the county that had employed her made several efforts to accommodate her but those efforts failed.

A Pennsylvania district court held that a former undercover narcotics officer who had undergone drug rehabilitation was not otherwise qualified to return to his former position since his drug use violated the laws he was sworn to uphold.[171] District courts also held that an employee who was chronically absent[172] and an employee who refused to obey a supervisor's orders[173] were not otherwise qualified.

Reasonable Accommodation. Under section 504 employers are required to make reasonable accommodations for handicapped employees unless doing so would impose an undue hardship on the operation of the program.[174] A federal district court in Wisconsin denied a school district's motion for summary judgment, holding that the record indicated that accommodations for a totally disabled teacher were possible but no evidence existed that those accommodations would create an undue financial or administrative burden on the district.[175]

A Pennsylvania district court held that any accommodations that would allow a former undercover narcotics officer who had undergone drug rehabilitation to resume his duties would be substantial modifications of essential functions of that position.[176] An Alabama district court held that the Rehabilitation Act does not require reassignment and that an employee who suffered from bilateral carpal tunnel syndrome was properly dismissed since he was unable to perform the essential functions of his position.[177] The court held that plaintiff's claim that the failure to give him light duty was a failure to reasonably accommodate his handicap was not supported.

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[167] 34 C.F.R. § 140.1(j).

[168] Daley v. Koch, 892 F.2d 212 (2d Cir. 1989).

[169] Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[170] Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990).

[171] Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990).

[172] Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990).

[173] Dowden v. Tisch, 729 F. Supp. 1137 (E.D. Tex. 1989).

[174] 34 C.R.F. § 104.12.

[175] Byrne v. Board of Educ., School Dist. of West Allis—West Milwaukee, 741 F. Supp. 167 (E.D. Wis. 1990).

The Ninth Circuit Court of Appeals held that a postal employee who was discharged after leaving his mail vehicle unattended while intoxicated had been reasonably accommodated through the provision of counseling and treatment and the execution of a last chance agreement which the employee had violated.[178] In its opinion the court adopted the reasoning of the Fourth Circuit's decision regarding the accommodations that must be provided to alcoholic employees.[179]

Other Section 504 Issues

Complaints were filed alleging that the Suncoast Dome, a sports stadium, failed to meet state and federal requirements concerning handicapped access. The City of St. Petersburg asserted that since no federal funds were used in the construction of the stadium, it had no federal obligation regarding handicapped accessibility. However, the district court found that the city had used federal block grants for the acquisition of land, relocation of occupants, and demolition at the site on which the stadium was built. The court held that the stadium was thus subject to the Rehabilitation Act.[180]

A New York district court awarded attorney fees to a successful plaintiff but held that the attorney was not entitled to a contingency enhancement as part of the award.[181] An attorney fees award was upheld by the district court of the District of Columbia after it found that the plaintiff had achieved her objective and was therefore a prevailing party.[182]

Since the Rehabilitation Act does not contain a statute of limitations, one must be borrowed from analogous state law. A Virginia district court found that a one year statute of limitations from a state law patterned to be consistent with the Rehabilitation Act was applicable.[183] The District of Columbia District Court held that a plaintiff did not file an appeal of a decision of the Equal Employee Opportunity Commission regarding claims of discrimination under the Rehabilitation Act within the proscribed thirty day time limit and that he failed to show that his psychological handicap prevented him from comprehending his legal rights or any other circumstance that would warrant equitable tolling of the thirty day limit.[184]

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[176] Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990).

[177] Black v. Frank, 730 F. Supp. 1087 (S.D. Ala. 1990).

[178] Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990).

[179] Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989). *See* Yearbook of Education Law 1990 at 121.

[180] Locascio v. City of St. Petersburg, 731 F. Supp. 1522 (M.D. Fla. 1990).

[181] Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1990).

[182] Callicotte v. Cheney, 744 F. Supp. 3 (D.D.C. 1990).

[183] Eastman v. Virginia Polytechnic Inst. and State Univ., 732 F. Supp. 665 (W.D. Va. 1990).

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[184] Kien v. United States, 749 F. Supp. 286 (D.D.C. 1990).

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TORTS

William J. Evans, Jr.

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INTRODUCTION

Torts are separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe each other. The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. This chapter will examine those cases reported during 1990 which involved tort claims within the school context. Included are cases involving school officials, school employees, students, and in some instances others visiting school grounds. Torts arising out of interscholastic sport participation are not included as they are discussed in Chapter 6.

NEGLIGENCE

A charge of negligence can result when an improper act or a failure to act results in an injury to another person. Negligence is established when one's actions fall below a standard of care expected of a reasonable person. The behavior expected of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. Against that standard, a court will determine whether liability may be imposed. Questions of law are determined by judges, while questions of fact are decided by juries.

The first case examined in this category involved actions by a principal. New York students and their mother brought an action against the school district and principal to recover for the principal's decision to release the students to the custody of their father. In affirming the trial court's decision, the appellate court found that the principal had exercised a degree of care consistent with that of a reasonably prudent parent. The father had presented a court order transferring custody to him, and the principal was bound to obey it.[1]

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases, divided into categories according to where or how injury was sustained, illustrate a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. The four cases in this section involve injuries incurred in several different types of locations. In each instance the school district was the prevailing party, which illustrates the difficulty of holding districts liable for student behavior beyond the schoolyard.

The mother of a New York teenager brought a personal injury action against her son's school district. The boy was injured in an accident in his home which involved chemicals he had stolen from school earlier in the day. The trial court denied the school board's motion for summary judgment and the decision was reversed on appeal. The student admitted that the teacher had specifically told the class to never remove chemicals from the classroom, and the teacher had gone over safety procedures in the classroom with him. The court found that the student's conduct, aside from being unforeseeable, went beyond contributory negligence and rose to the level of culpability. This served to replace any negligence on the part of the defendant school district.[2]

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[1] Sprecher v. Port Washington Union Free School Dist., 561 N.Y.S.2d 284 (App. Div. 1990).

An Arkansas case examined the question of whether a school district must insure a bus chartered for a one day field trip when the bus is not owned by the school district nor driven by a district employee. The answer given by the court was no. The injuries sustained by a junior high school student on a field trip led to the action her parents brought against the school district. In upholding the dismissal of the case, the court found no legislative intent for a school district to insure a bus owned by an independent entity.[3]

A New York kindergarten student brought home a project from school which consisted of toothpicks glued to construction paper. While in the home of a neighbor, she took one of the toothpicks and inserted it into the ear of a younger child. Her mother's suit for damages was dismissed by the trial court and the decision was upheld on appeal. The court found that the kindergarten student had passed out of the orbit of the school's authority at the time of the accident. No duty was found owed to the injured child as she was under the supervision of her mother when the incident occurred. Accordingly, the school was not liable for allowing a dangerous instrument to be removed from the school. The intended use of the toothpicks was not seen to have created a foreseeable danger.[4]

A nineteen-year-old New York student, who was injured while at a work-study job, brought an action for damages against the school board and Board of Cooperative Educational Services (BOCES). The summary judgment granted the defendants was affirmed on appeal. The court held that since the student was over the age of majority at the time of the accident, the less demanding standard of "reasonable care" was appropriate. Furthermore, the work-study agreement imposed no specific duty on the school, and only a general supervisory role on BOCES. All evidence supported the conclusion that it was a job related accident for which the plaintiff properly received workers' compensation benefits.[5]

School Settings During School Hours. The cases in this section involve injuries incurred during school hours in which sovereign or statutory immunity was not advanced as a defense by the school district or employee.

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[2] Brazell v. Board of Educ. of Niskayuna Schools, 557 N.Y.S.2d 645 (App. Div. 1990). *See* Greiner v. Whitesboro School Dist., 562 N.Y.S.2d 255 (App. Div. 1990). Suspension of a student who was allegedly intoxicated was not found to be the proximate cause of an automobile accident which occurred several hours later.

[3] King v. Little Rock School Dist., 782 S.W.2d 574 (Ark. 1990).

[4] Fuzie v. South Haven School Dist., 553 N.Y.S.2d 961 (Sup. Ct. 1990).

[5] Kennedy v. Waterville Cent. School Dist., 555 N.Y.S.2d 224 (Sup. Ct. 1990).

A sixth grade student was injured when he was struck by a rock thrown by a fellow student during recess. His action to recover for personal injuries resulted in a summary judgment for the school district. That decision was affirmed on appeal as the New York court found the school could not have been expected to anticipate the intervening actions of a third party.[6]

Also during recess, a Louisiana student was injured when she fell or was pushed off a six-foot slide. The teacher on duty had over twenty-two years of experience with young students, and she had taken safety courses instructing her how to teach children to play safely on playground equipment. These facts led the appeals court to reverse a decision which found the board of education liable for the student's injuries.[7]

In two cases with similar facts, an Alabama fourth grade student was injured when struck by a rock thrown by another student,[8] and an Ohio first grade student was struck in the eye by a dirt ball thrown by an older student.[9] In denying the students' claims for damages, the courts found that no amount of planned supervision by teachers would have prevented the unforeseeable accidents.

A junior high school student was injured when she slipped on a green pepper on the floor of her school's cafeteria. The Maine Supreme Court affirmed the trial court's decision absolving the city of liability. There had been no actual or constructive knowledge by the city of the existence of a foreign object on the floor.[10]

A sixth-grade Alabama student was injured by falling glass after a ball hit a light bulb in a light fixture hanging from the ceiling of the school's gymnasium. Suit against the school principal and the physical education teacher resulted in a summary judgment in the principal's and teacher's favor. That decision was upheld on appeal as neither employee was found to have any responsibility for the design or maintenance of the light bulbs or light fixtures.[11]

Another accident involving stairs in a school resulted in a claim for damages by a Louisiana student. The trial court's decision for the city was upheld on appeal. Sufficient evidence was not presented that there was a foreign substance on the stairs which could have caused the student to slip and fall.[12]

A North Carolina student who was allegedly sexually assaulted by her school's principal brought an action for damages against the school board and superintendent. Neither defendant was found liable to the student for the negligent hiring and retaining of the principal even though the principal had earlier resigned from another school after a similar accusation. Employment recommendations contained no evidence that the principal was a pedophile, and he had performed his duties in a satisfactory manner for sixteen years before the alleged incident. Furthermore, the principal's role in counseling a truant student was unrelated to sexual assault and thus he would have stepped out of the course and scope of his employment in assaulting the student.[13]

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[6] Hauser v. North Rockland Cent. Dist. No. 1, 560 N.Y.S.2d 835 (App. Div. 1990).

[7] Brooks v. Orleans Parish School Bd., 560 So. 2d 633 (La. Ct. App. 1990).

[8] Green v. Bester, 568 So. 2d 792 (Ala. 1990).

[9] Allison v. Field Local School Dist., 553 N.E.2d 1383 (Ohio Ct. App. 1988). *See* Amendola v. Geremia, 571 A.2d 131 (Conn. Ct. App. 1990). A trial was necessary to determine whether a reasonably prudent person (student) would spray another person with a substance from a bottle without first inspecting the contents of the bottle.

[10] Milliken v. City of Lewiston, 580 A.2d 151 (Me. 1990).

[11] Beasley v. Morton, 564 So. 2d 45 (Ala. 1990).

[12] Jones v. City of New Orleans, 559 So. 2d 28 (La. Ct. App. 1990).

En route to and from School. A fourth-grade Missouri student suffered an eye injury after an object was thrown through an open bus window. A complaint was filed on his behalf against the school district and bus company. The jury returned an award for the plaintiff which was reduced as the student was found 40% at fault. The plaintiff appealed, and there was a cross-appeal by the bus company, but the decision from the trial court was affirmed.[14] The bus company had met its primary responsibility of complying with safety laws, rules, and regulations, although testimony revealed that the throwing of objects at the bus had been a regular occurrence. Therefore, the bus company's claim of unforeseeability was rejected. Additionally, the lowered window was seen as a proximate cause of the injury. The court found that the state's regulation limiting the degree to which a bus window can be opened was intended to prevent the harm which befell the student.

The mother of a severely handicapped and mentally retarded New York student brought an action against the city board of education, operator of the school bus company, and city to recover for injuries the student sustained while either being transported, or while at school. In ruling against the student, who was unable to communicate for himself, the court found nothing to indicate that the injury was caused by an agency or instrumentality of the defendants.[15]

A California elementary school pupil was killed while crossing the street after getting off the school bus. His parents' negligence action against the school district was initially unsuccessful as the district was granted a summary judgment. In reversing that decision, the appeals court found that the district had prior awareness that children were crossing the street after the bus had departed. Whether the care exercised was reasonable was held to be an issue properly determined by trial.[16]

Trial also was ordered in a Florida case where a summary decision for a school board was reversed. A nine-year-old student had been required to transfer to another school because of a need for speech therapy. The school board specifically directed the child's father to use public transportation until school bus transportation could be arranged. During that time, the father used public transportation with his son and instructed him daily on how to cross a busy intersection near the school. On the first day the boy was allowed to go to school alone, he was struck and killed by an automobile. The board agreed that it had breached its duty when a clerical error delayed transportation for two weeks. The court failed to recognize the board's contention that the father's failure to supervise his son was an intervening cause relieving the school board of liability. If, as the board maintained, the child was too young to make the trip unescorted, a jury question of comparative negligence could be raised.[17]

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[13] Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990).

[14] Lockett v. Board of Educ. for School Dist. No. 189, 555 N.E.2d 1055 (Ill. App. Ct. 1990).

[15] Rabena v. City of N.Y., 556 N.Y.S.2d 807 (Civ. Ct. 1990).

[16] Farley v. El Tejon Unified School Dist., 274 Cal. Rptr. 780 (Ct. App. 1990).

The role of parental supervision was the determining point in another Florida case. While walking to school with his mother, a student left her side and walked out into the middle of the road. The injuries he sustained when he was hit by a car resulted in an action against the county and county school board. Summary judgment for the county and board was upheld on appeal. The court determined that no number of traffic signals, traffic control devices, or school maps with safe routes identified can provide any greater protection for a child than the attendant supervision of a parent. The sole proximate cause of the student's injuries was seen as his stepping out into the street without keeping a proper lookout while under his mother's care.[18]

School Buildings and Grounds. The issue of assumed risk served to preclude a summary judgment for a Georgia school board. A student's mother had been called to school to pick up her son who had been placed in detention. While descending a stairway, the parent slipped on steps which were wet due to rainy conditions. Although she had negotiated the steps upon entering the building, the court held it to be a matter for trial whether this served as notice of possible danger relieving the school board of liability.[19] An Illinois woman brought an action for injuries she sustained in a school parking lot. The appeals court reversed the summary judgment for the school district. Even though the woman admitted that she knew of the existence of a curb over which she tripped, whether the district had a duty to warn her of the curb was held to be a matter for trial.[20]

School-related Activities. A California high school student was injured during a school hypnotism show sponsored by a parent-teacher-student association. At issue was the release from liability signed by the student and her father. The trial court granted summary judgment for the association and school district and the student appealed. In reversing that decision, the appeals court found a release signed by a parent proper, as parents have the right to enter into a contract on behalf of their children. However, the release itself was not found to bar recovery for injuries by the student. It contained no language speaking of a release from liability for negligence or bodily injury. Lacking these specifics, the court found a triable issue to exist.[21]

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[17] Brunson v. Dade County School Bd., 559 So. 2d 646 (Fla. Ct. App. 1990).

[18] Garcia v. Metropolitan Dade County, 561 So. 2d 1194 (Fla. Dist. Ct. App. 1990).

[19] Spivey v. Board of Educ. of Savannah & Chatham County, 391 S.E.2d 783 (Ga. Ct. App. 1990).

[20] Zumbahlen v. Morris Community High School Dist. No. 101, 563 N.E.2d 1228 (Ill. App. Ct. 1990).

NEGLIGENCE DEFENSES

Even if an injured plaintiff can satisfy the *prima facia* case, the defendant school district, administrator, or teacher still has a number of defenses available to overcome the claim. These defenses range from immunity to the more usual affirmative defenses. The motivation behind the immunity defense is to limit the flow of public money to private citizens. Liability payments could detract from the educational functions of the schools. Affirmative defenses keep plaintiffs from recovering for behavior that in some way is responsible for the injury that occurred.

Immunity

Common Law (Governmental Immunity). Traditionally courts have been reluctant to disturb this defense as school districts are state agencies created by state law to perform a governmental function. However, the use of this defense is increasingly being limited by statute and judicial interpretation. Litigation in this area generally seeks to test limits and exceptions. In only one of this year's six cases was a plaintiff successful in challenging governmental immunity.

A fifteen-year-old student was killed when she was struck by an automobile after departing from a school bus. The trial court granted summary judgment in favor of the driver and school district in the suit for damages brought on behalf of the student. That decision was reversed on appeal. For several days prior to the accident, the student had been leaving the bus by way of the rear emergency exit to avoid harassment habitually suffered by female students who rode the same bus. The driver had been aware of both situations, but she had not made any effort to prevent them. The court concluded that the driver could be held legally responsible for the safety of passengers discharged near a highway where the driver knew passengers crossed the highway to reach their homes. The stopping of a school bus for the purpose of discharging passengers, and the driver's duties attendant to the stopping of the bus, were deemed to constitute the operation of a motor vehicle. Therefore, the school district was found liable for the driver's actions as the violations fell within the motor vehicle exception to governmental immunity.[22]

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[21] Hohe v. San Diego Unified School Dist., 274 Cal. Rptr. 647 (Ct. App. 1990).

A Tennessee teacher was assaulted in her school building prior to the beginning of the school year on a day in which teachers were allowed to come into school to set up their classrooms. At the time of the assault, most of the school's doors were locked. However, the assailant entered through a door which had been wedged open with a glove to allow personnel access to the school. In her action for damages, the trial court decision for the school board was upheld. The method of securing the school building was found a discretionary decision of the principal for which the board was protected by governmental immunity.[23]

A construction contractor's claim for lost profits against a Missouri school district constituted a tort claim, rather than a breach of contract claim, and was thus barred by sovereign immunity. At issue was the construction of an athletic track. As such construction is a distinct part of the secondary educational process, the ability to enforce provisions in a contract related to the construction was seen as a governmental function immune from tort liability.[24]

A North Carolina student was permanently disabled when he was struck by a truck while attempting to reach his assigned school bus stop. The student's action against the school board alleged negligent design of a school bus route and stop location. The trial court dismissed the suit and appeal was sought. In affirming the decision, the appellate court found that the board had not waived its governmental immunity by obtaining a liability insurance policy. While a school board can, through such a policy, determine whether or to what extent to waive immunity, the court found it inconceivable that the board intended to waive immunity for injuries associated with the design of a bus route or location of a bus stop.[25]

The summary judgment in a wrongful death action, for a student who was killed by a motorist, was upheld on appeal. Supervision of children as they return home from school was determined by the Georgia court to be a discretionary act for which a principal was entitled to the defense of official immunity.[26]

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[22] Nolan v. Bronson, 460 N.W.2d 284 (Mich. Ct. App. 1990). *See* Martinez v. Moroldo, 553 N.Y.S.2d 751 (App. Div. 1990). The issue of whether a mother had given written permission to drop off a student at home precluded a summary judgment for the bus company and board of education. Clomon v. Monroe City School Bd., 557 So. 2d 1100 (La. Ct. App. 1990). An automobile driver, who struck and killed a child departing a school bus, was awarded damages for severe emotional trauma.

[23] Doe v. Board of Educ. of Memphis City Schools, 799 S.W.2d 246 (Tenn. Ct. App. 1990).

[24] Joske Corp. v. Kirkwood School Dist. R-7, 903 F.2d 1199 (8th Cir. 1990).

[25] Beatty v. Charlotte-Mecklenburg Bd. of Educ., 394 S.E.2d 242 (N.C. Ct. App. 1990). *See* Brown v. Egan Consol. School Dist. #50-2, 449 N.W.2d 259 (S.D. 1989). Regarding an accident a driver had with a school bus, the school district waived its sovereign immunity to the limit of its liability insurance coverage.

An Illinois student and her mother brought an action alleging negligence and willful and wanton misconduct by her teachers and school district. While jazz dancing during physical education class, the student fell when her foot slipped between two overlapping mats. She was then denied permission to see the school nurse. In her next two classes she was also refused permission to see the nurse. Subsequently, it was discovered that she had broken her ankle. The trail court dismissed the action and appeal was sought. The dismissal was upheld as the court found immunity conferred to teachers from negligence actions unless their conduct was willful and wanton. The plaintiffs failed to make such a showing as there was no allegation that the defendants intended to harm the student, nor did the facts support a finding of an utter indifference or conscious disregard for the student's safety.[27]

Statutory Immunity. Within certain limitations, the South Carolina Supreme Court has abolished the doctrine of sovereign immunity.[28] In response, the state legislature enacted a tort claims act. The effective date of the act was at issue following an accident for which a student sought damages for severe burns he received while working on school premises. The court found that the effective date of the act served to limit the recovery amount to that stipulated by the act. Possession by a school district of liability coverage in excess of the statutory limit was not found to constitute a waiver of immunity up to the coverage limit. Finally, the parents claim for medical expenses and loss of services were separate claims each bringing an entitlement to damages.[29]

An elementary student was injured when she fell from a set of monkey bars during recess on an Illinois school playground. Her negligence action against the school district resulted in a summary judgment for the district. On appeal, the statutory immunity granted the district was successfully challenged and the case was remanded for trial. The court found that the supplying of equipment and the condition of the premises are not part of the direct teacher-student relationship. Thus, they fall outside of the limited protection of the immunity provisions. In addition, the two persons supervising the playground were uncertified employees. As such, they were not entitled to the immunity statutorily granted to a certified employee and thus vicariously to the school district.[30]

An Illinois student was injured when she slipped on icy stairs as she exited her school for recess. The state's tort immunity act explains that a school district may not be held liable for any injuries suffered as a result of weather conditions including the accumulation of ice. Absent a finding of willful and wanton misconduct by the school board, the trial court's dismissal of the student's action for damages was upheld by the appeals court.[31]

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[26] Lewis v. McDowell, 390 S.E.2d 605 (Ga. Ct. App. 1990). *See* Montgomery v. City of Detroit, 448 N.W.2d 822 (Mich. Ct. App. 1989). A principal was entitled to immunity as his alleged failure to provide emergency procedures was a discretionary decision.

[27] Gara v. Lomonaco, 557 N.E.2d 483 (Ill. App. Ct. 1990).

[28] McCall v. Batson, 329 S.E.2d 741 (S.C. 1985).

[29] Wright v. Colleton County School Dist., 391 S.E.2d 564 (S.C. 1990).

[30] Jastram v. Lake Villa School Dist. 41, 549 N.E.2d 9 (Ill. App. Ct. 1989).

Parents of a Montana student removed him from school and enrolled him in a private school after he had a series of verbal and physical altercations with other students. Following that action, the parents brought a suit for damages alleging that the school district and its employees had failed to provide a safe educational environment in violation of the state constitution's guarantee of a free quality elementary and secondary education for its citizens. The trial court granted a summary judgment for the school district, finding the defendants immune from suit. That decision was upheld on appeal as the parents failed to show that the school employees were not acting within the scope of their authority.[32]

A recreational use statute grants immunity from liability to owners of property in New York who permit members of the public to come on their property to engage in several enumerated recreational activities.[33] Sledding and tobogganing are among those listed. When an action was brought on behalf of a child who was injured while sliding on an inner tube on school property, the district claimed statutory immunity from the suit. When the court held the district immune from liability, the plaintiffs moved for a dismissal of the defense claiming the injury was a result of sliding not sledding. In denying the plaintiff's motion, the court examined the definition of the term "sled" as it has evolved from a vehicle on runners to a vehicle that usually has runners. The court also found that the property in question was of a type physically conducive and appropriate for public use in recreational sledding.[34]

A Missouri teacher who was raped by a student brought an action against two assistant principals alleging negligent supervision. The trial court's dismissal of the action was upheld on appeal. The court explained that an injured employee who sues a co-employee for injuries covered by workers' compensation must allege more than that the employee failed to provide a reasonably safe place to work.[35]

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31. Washington v. Chicago Bd. of Educ., 562 N.E.2d 541 (Ill. App. Ct. 1990).
32. Hayworth v. School Dist. No. 19, 795 P.2d 470 (Mont. 1990).
33. General Obligations Law Section 9-103(1)(a).
34. Gruber v. Fairport Cent. School Dist., 556 N.Y.S.2d 965 (Sup. Ct. 1990). *See* Farber v. Pennsbury School Dist., 571 A.2d 546 (Pa. Commw. Ct. 1990). A student who fell while participating in a district sponsored race in which he was carrying another student on his back failed to show that the activity fell within the real property exception to immunity; Schleft v. Board of Educ. of Los Alamos Pub. Schools, 784 P.2d 1014 (N.M. Ct. App. 1989). A state tort claims act waiver of immunity in maintenance of buildings applied to both the school grounds and school building.
35. Stewart v. Little, 797 S.W.2d 862 (Mo. Ct. App. 1990).

While on a school-sponsored trip, a Texas high school student was injured when she struck her head on the top of a rear exit door of a school bus. The student had been sitting unsupervised in the doorway just before the accident. The action for damages against the school district and bus driver resulted in a summary judgment and the student sought appeal. In upholding the decision, the appeals court found the defendants immune from liability. There was no evidence of negligence in the operation or use of the school bus which could have provided exception to the immunity defense.[36]

Other Defenses

Comparative Negligence. Comparative negligence allows the jury the opportunity to allocate damages in proportion to the amount of responsibility the various parties had for the injury. Cases from Iowa, Louisiana, and New York were reported in the comparative fault area.

An eleven-year-old Iowa student was injured when he slipped and fell while sliding on a patch of ice during recess. At the trial for damages, the jury found the student 75% negligent, and the school district 25% negligent. On appeal the plaintiff claimed that the district court had erred in instructing the jury, and improperly excluded portions of a recreational safety expert's testimony. In affirming the opinion, the appellate court found no prejudicial error in the jury instructions. The expert's testimony on standards of care the school district was responsible for in the maintenance and supervision of its playground area was found properly excluded. The testimony fell outside his area of expertise or required him to speculate and give opinions on questions of law.[37]

During summer recess, two students obtained four partially used cans of flammable duplicating fluid from a garbage dumpster located in the rear of a Louisiana elementary school. When they began to play with the fluid by creating small fires, another child came upon the scene and was badly burned. Suit against the students and the school board was brought on behalf of the injured child. The trial court dismissed the action against the board and apportioned fault between the students. On appeal, the court determined that the school board was improperly dismissed from the suit. The court cited the board's duty to properly dispose of the duplicating fluid, and its knowledge of the likelihood that students would play in and around the dumpster. The injuries were held reasonably foreseeable and the school board was re-assessed to be 55% at fault.[38]

A New York appellate court ordered a new trial in a negligence action brought to recover for injuries a student sustained while playing touch football on an icy asphalt surface.[39] The court agreed that the school board had failed to maintain the schoolyard in a reasonably safe condition. Additionally, school officials had knowingly allowed unsupervised play before school. While the defendants were found liable, a new trial was ordered on the issue of apportionment of fault. Having determined that the student assumed the risk of injury by participating in a football game on an icy surface, the court held that the jury should have found his actions to be the proximate cause of his injuries.

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[36] LeLeaux v. Hamshire-Fannett Indep. School Dist., 798 S.W.2d 20 (Tex. Ct. App. 1990).
[37] Oldham v. Shenandoah Community School Dist., 461 N.W.2d 207 (Iowa Ct. App. 1990).
[38] Brown v. Tesack, 566 So. 2d 955 (La. 1990).

Notice of Claim. Plaintiffs are increasingly seeking the right to file late notice of claim. Fourteen cases were reported, a number of which were decided on largely technical grounds.[40] The first case is of particular interest. A New York court found it an issue for trial whether magazine articles about asbestos could have constituted notice.

Following the death of a former junior high school student, a wrongful death action was brought against a New York City board of education. Claim was made that the death in 1986 was a result of exposure in school to friable asbestos between the years of 1967 and 1970. The court granted the city's motion for summary judgment. New York law provides that an owner out of possession, without contractual or statutory obligation to maintain the premises, is not liable in tort to third persons injured as a result of a dangerous condition which arises on the premises. However, a triable issue of fact was recognized regarding the school board's constructive notice. Although no federal or state safety standard banning the use of asbestos materials was in place in the 1950s and 1960s, the plaintiff pointed to numerous articles published in general circulation magazines. The school board was unsuccessful in its attempt to join the school's architect and the asbestos manufacturer in the action. The architect could only have been found liable for a negligent performance of his professional services. Since he could not have known of the deleterious effects of asbestos between 1956 and 1959, summary judgment was found in his favor. The court granted the manufacturer's motion to dismiss for lack of jurisdiction due to the board's failure to meet notice requirements.[41] The question of whether a school board's general duty to supervise students is dependent upon notice of specific dangers was addressed in a New York case. A young student sought damages for injuries received when she was trampled by running students. Following instructions to the jury reflecting the necessity of notice, the jury returned a verdict in favor of the school board. That decision was reversed on appeal as the jury instructions were found to be an incorrect statement of law. The court found that where the duty to supervise is mandatory, notice is not an issue.[42]

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[39] Chan v. Board of Educ. of City of N.Y., 557 N.Y.S.2d 91 (App. Div. 1990).

[40] *See* Environmental Compliance Inc. v. William Floyd Union Free School Dist., 552 N.Y.S.2d 39 (App. Div. 1990); Aetna Casualty & Surety Co. v. Denver School Dist., 787 P.2d 206 (Colo. Ct. App. 1989); Krainock v. Superior Court, 265 Cal. Rprt. 715 (Ct. App. 1990); Kaye v. Town of Manchester, 568 A.2d 459 (Conn. Ct. App. 1990).

[41] Barnett v. City of Yonkers, 731 F. Supp. 594 (S.D.N.Y. 1990).

A student's mother made application to serve a late notice of claim against a New York school district. It was alleged that the student was injured in the school's gymnasium during a game of kick ball. In denying the application, the court found a failure to show that the school district had received actual notice of the essential facts of the claim within a reasonable time. There was no allegation that anyone actually witnessed the alleged incident, and the school had no related record.[43]

The Maine Supreme Court decided a case in which parents of an injured student were not found to have met notice requirements by merely returning an accident form to a school's bookkeeper. The parent's claim for additional medical benefits for their daughter, after a year of benefits had ended, was barred by the late notice of claim.[44]

In another Maine case, a fifth grade student brought an action alleging that the city, public schools, and principal were negligent in failing to supervise a teacher who was convicted of committing unlawful sexual contact with the student. The dismissal of the suit as untimely was upheld on appeal. The court rejected the contention that the student's minority status constituted good cause to extend the notice requirement. In addition, neither the mistaken belief that the district attorney was acting on his behalf, nor his ignorance of his rights and duties under the tort claims act excused the student from filing timely notice of claim.[45]

A former student brought suit against his former teacher and Minnesota school district claiming sexual abuse thirteen years earlier. At some point after the alleged abuse, the plaintiff suffered traumatic amnesia which inhibited his memory of the assaults. The trial court found the claims barred as untimely. While appeal of that decision was pending, the Minnesota Legislature enacted a statute which stated that a sexual abuse claim does not arise until the victim knew or had reason to know his injury was caused by abuse.[46] The appeals court reversed the earlier decision and remanded the case for trial. That decision was reaffirmed when, at the direction of the state supreme court, the appellate court considered and upheld the constitutionality of the statute. In addition, the statute was found retroactively applicable, requiring the case to again be remanded for trial.[47]

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[42] Coon v. Board of Educ. of the City of N.Y., 554 N.Y.S.2d 110 (App. Div. 1990). *See* Cooper v. Baldwin County School Dist., 386 S.E.2d 896 (Ga. Ct. App. 1989). The school district was not found to have breached a duty to protect a student from a knife attack.

[43] Salyer v. Valley Cent. School Dist., 558 N.Y.S.2d 746 (App. Div. 1990). For another example of failure to make timely notice *see* Stoetzel v. Wappingers Cent. School Dist., 561 N.Y.S.2d 71 (App. Div. 1990).

[44] Smith v. School Administrative Dist. No. 58, 582 A.2d 247 (Me. 1990).

[45] Martin v. City of Biddeford, 568 A.2d 1103 (Me. 1990).

[46] Minn. Stat. § 541.07(1) (1988).

A California school district sued various defendants in connection with asbestos products in its school buildings. One defendant moved for dismissal of the claim stating that it had not been served notice within three years of the commencement of the action, and that more than two years had lapsed since the filing of the complaint. In denying the petition, the court explained that the action was "complex litigation" under California judicial rules.[48] Within that context, the trial court had given stay orders which gave rise to the proceeding. That stay was found to have precluded a notice of claim until it was lifted. After factoring in the length of the stay, the court determined that the summons and complaint came well within the required three years.[49]

A worker sued a New York school district to recover for damages allegedly incurred through the installing of asbestos products in schools. The action was dismissed as the worker failed to timely file notice of claim. Although a statute had been enacted which extended the period of limitations for some asbestos related actions, it was only intended to revive those claims which had previously been barred.[50]

A New York State trooper sought to serve a late notice of claim for an injury he allegedly sustained when he fell on a set of stairs while investigating a school burglary. The trial court's denial of the motion was upheld on appeal. The court found that the trooper failed to inform the school district that he was injured as a result of the fall. The fact that a school employee was present at the time of the fall did not meet that obligation. The lack of notice was found supported by the fact that the trooper made no effort to seek legal counsel until "quite recently" when he learned of the severity of his injuries.[51]

In Louisiana, parents of a student who was injured when he fell from bleachers at a high school sued the school board for damages. When the trial court held that the Parish Commission Council could not be added as a defendant, the parents sought appeal. In affirming the decision, the appeals court held that there was no proof the close relationship between the school board and the Council supported the allegation that the council was or should have been informed of the suit. The fact that the student's father was in the military service, was not found to have prejudiced his ability to pursue his cause of action.[52]

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[47] K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990). *See* Nichols v. Board of Educ. of Ballston SPA Cent. School Dist., 562 N.Y.S.2d 831 (App. Div. 1990). A late notice of claim was allowed where the school district had actual notice of the student's injury.

[48] Calif. Rules of Court, app. div. 1, § 19.

[49] Highland Stucco & Lime v. Superior Court, 272 Cal. Rptr. 60 (Ct. App. 1990). *See* Drayton Pub. School Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410 (D.N.D. 1989). Summary judgment was denied because issues of fact existed in connection with the commencement of the limitations period and the district's claim of fraud and concealment.

[50] Vine v. John Manville Sales Corp., 551 N.Y.S.2d 640 (App. Div. 1990).

[51] Kalinsky v. State Univ. of N.Y., 557 N.Y.S.2d 577 (App. Div. 1990).

Following an accident in which an automobile allegedly was rear-ended by a school bus, two California passengers sought to bring an action for damages. Their complaint was timely filed with the board of education, but the proper party for the suit was the county office of education. In finding that the trial court had properly denied a motion for reconsideration, the court pointed to the fact that despite notification that they had served the wrong entity, the appellants did not seek to file a late-claim application with the correct entity for over a year.[53]

LIABILITY INSURANCE

A Michigan school district sued its liability insurer to recover costs incurred in the defense and settlement of an alleged civil rights violation. A teacher successfully alleged that she was denied tenure because of her religious beliefs. While the case was pending, the district agreed to a monetary settlement. The trial court's decision for the insured was upheld on appeal. The insured's alleged breach of a collective bargaining agreement prohibiting religious discrimination was not found to be a breach of contractual obligation covered by a policy exclusion.[54]

Reimbursement for costs incurred in the defense and settlement of a civil rights action also was at issue in a Missouri case. The settlement had been as a result of an alleged nonrenewal of a teacher's contract in retaliation for the teacher's exercise of first amendment rights in joining a particular educational organization. The Eighth Circuit Court of Appeals affirmed that the "wrongful act" language in the school district's liability policy covered the civil rights suit. However, the district was not found entitled to attorney fees as the suit was essentially to redress violations of civil rights, not contract-type remedies.[55]

ATTORNEY FEES

A Florida plaintiff, who unsuccessfully brought a civil rights action against a county school board, appealed an order requiring her to pay costs and attorney fees. The district court reversed the ruling explaining that, pursuant to federal law, a defendant board is not entitled to attorney fees simply because it prevails. There was no showing that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.[56]

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[52] Hernandez v. Plaquemines Parish School Bd., 563 So. 2d 516 (La. Ct. App. 1990).

[53] Santee v. Santa Clara County Office of Educ., 269 Cal. Rptr. 605 (Ct. App. 1990). *See* Johnson v. San Diego Unified School Dist., 266 Cal. Rptr. 187 (Ct. App. 1990). The State Board of Control's failure to inform a student that it was not the proper agency for service in an injury claim did not serve to extend the notice requirement.

[54] School Dist. for City of Royal Oak v. Continental Casualty Co., 912 F.2d 844 (6th Cir. 1990).

[55] New Madrid County Reorganized School Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990).

A nonunion teacher petitioned for review of a decision of the Public Employment Relations Board which rejected most of the teacher's objections to the withholding of a portion of his paycheck by the union for inappropriate purposes. That decision was reversed and the case was remanded. On remand, the court held that the very high number of hours claimed reflected the inexperience of the lead counsel more than any complexity or novelty of the issues. Additionally, a multiplier of 0.6 rather than the requested 2.0 would be used in determining fees to reflect the petitioner's partial success.[57]

A school board official successfully brought an action to stop a recall election. She then filed a motion claiming that as a public interest litigator, attorney fees and court costs should not be assessed against her. In granting the motion, the court held that four tests were met: (1) the case was designed to effectuate strong public policies; (2) numerous people benefitted; (3) only a private party could have been expected to bring the suit; and (4) the board official did not otherwise have a sufficient economic incentive to file suit.[58]

In Louisiana, a principal brought suit against the school board for attorney fees incurred when he brought suit to stop his involuntary transfer. The court held the action was barred by sovereign immunity enjoyed by the school board.[59]

A male student, who had obtained a preliminary injunction to participate on a Colorado girl's gymnastic team, lost his award of attorney fees when the decision in a companion case was reversed.[60]

A newspaper and newspaper foundation brought an action seeking to direct an Idaho city and school district to publish their legal notices in a properly qualified newspaper. Following an unfavorable decision, the newspaper and foundation appealed the award of attorney fees to the city and school district. In reversing the award, the court determined that the purpose of the suit was not merely to create the possibility of future beneficial commercial transactions. Rather, it was to compel performance of a perceived public duty.[61]

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[56] Oldring v. School Bd. of Duval County, 567 So. 2d 519 (Fla. Ct. App. 1990). *See* Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990). Plaintiff was entitled to attorney fees under § 1988 even though her constitutional claims were not reached as state claims became primary; Associated Builders & Contractors of La., Inc. v. Orleans Parish School Bd., 919 F.2d 374 (5th Cir. 1990). A plaintiff in a civil rights suit was awarded attorney fees as a "prevailing party" under the Civil Rights Attorney's Fees Awards Act.

[57] Cumero v. Public Employment Relations Bd., 272 Cal. Rptr. 195 (Ct. App. 1990).

[58] McCormick v. Smith, 799 P.2d 287 (Alaska 1990).

[59] Foster v. State, 560 So. 2d 502 (La. Ct. App. 1990).

[60] Dahlem v. Board of Educ. of Denver Pub. Schools, 901 F.2d 1508 (10th Cir. 1990).

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A New York teacher, who injured her knee when she fell in a school auditorium, sued her board of education for lost, past, and future earnings from an alleged permanent disability incurred at work. Her appeal of the decision for the defendants was unsuccessful. Evidence that a plaintiff voluntarily chose to retire is often considered so prejudicial as to be inadmissible. However, in this instance the court allowed the evidence as it was determined to have significant value with respect to validly raising questions about the teacher's malingering or motivation for not working.[62]

While leading her class down a flight of stairs to the school's gymnasium, a New York teacher slipped and injured her back. In her action against the board of education, the trial court awarded her damages, but rejected her husband's claim of damages for loss of consortium. On appeal, the court reversed the finding on the loss of consortium finding that portion of the decision inconsistent with the recognition of injury to the teacher.[63]

A New York teacher claimed that after she stepped in a liquid left on a school's stairway landing she slipped and sustained injury. In upholding the denial of her claim for damages, the court found that by continuing down thirteen steps, walking through a set of doors, and making a turn before she slipped, no connection could be found between the substance on the landing and her fall.[64]

The Louisiana Department of Education was named in an action brought by a junior high school physical education teacher against parents and the school board. At issue in the appeal was whether a large class size directly contributed to the outbreak of a fight between two students during which a teacher was injured. The appellate court reversed the trial court's holding, finding reasonable minds could differ on whether the Department is legally entitled to dismissal from the suit. Whether the Department should have been aware, and bore responsibility for noncompliance with class size regulations, was deemed a matter for trial.[65]

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[61] Idaho Newspaper Found. v. City of Cascade, 788 P.2d 237 (Idaho Ct. App. 1990).

[62] Kish v. Board of Educ., 559 N.Y.S.2d 687 (App. Div. 1990).

[63] Safchik v. Board of Educ. of City of N.Y., 550 N.Y.S.2d 679 (App. Div. 1990). *See* Gosnell v. Dorchester School Dist., 389 S.E.2d 865 (S.C. 1990). A husband's loss of consortium was a recoverable loss under the state tort claims act.

[64] McCarther v. Board of Educ. of City of N.Y., 554 N.Y.S.2d 912 (App. Div. 1990). *But see* Morris v. Orleans Parish School Bd., 553 So. 2d 427 (La. 1989). A school board was held negligent for failure to repair a leaky water fountain.

An employee of a company, which had contracted with an Alabama school district to provide transportation for handicapped students, was injured when the brakes failed on the bus he was driving. In denying his claim for damages, the Alabama Supreme Court held that the school board had not relieved the contractor of its obligations to properly maintain the vehicle when the company subcontracted with another company to furnish the transportation. However, the contract between the school board and the defendant company was intended to provide benefit for the transported students, not third-party benefits to an employee of a subcontracted company.[66]

A substitute custodian was held not to be acting within the scope of his employment when he had an automobile accident while on the way to work. The action was brought by a motorist who was involved in the accident in an attempt to hold the school board vicariously liable for his injuries. A Maryland appeals court found that the necessity for the custodian to travel to any of thirty different schools did not give the board control and therefore responsibility over the use of his vehicle.[67]

Several employers successfully petitioned the apportioning of liability for claimants' injuries or disability. In Colorado, cases allowed for pension benefits[68] and social security[69] to be deducted from workers' compensation awards. In Washington, when an employee's injury resulted in the worsening of a preexisting condition, the employer was able to recover from a second injury fund.[70] However, in Louisiana a claimant could not have her benefits reduced for receiving disability retirement payments.[71]

An Arkansas widow sought compensation benefits in connection with the death of her husband the morning after he took a required teacher competency test. Her appeal of the compensation commission's denial of benefits resulted in the case being remanded for a new decision. The court held that consideration was required as to whether there was a close temporal relationship between the husband's heart attack and the stressful work-related examination.[72]

The difference between an occupational disease and a compensable personal injury was delineated in an Arizona case. A teacher was forced to resign when serious health complications developed following her exposure to pesticides in the work-place. The determination that she was suffering from an uncompensable occupational disease, one that was not incidental to the character of the place of employment, was reversed on appeal. The court recognized that the teacher knew she was allergic to pesticides, and that the school district said that she would not be exposed to the chemicals to which she reacted. Since the external cause and the resulting injury were not expected, the court ruled that she suffered an injury for which workers' compensation was appropriate.[73]

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[65] Manders v. Singleton, 558 So. 2d 772 (La. Ct. App. 1990).

[66] Dupont v. Yellow Cab Co., 565 So. 2d 190 (Ala. 1990).

[67] Sheets v. Chepko, 573 A.2d 413 (Md. Ct. Spec. App. 1990).

[68] Jefferson County Pub. Schools v. Sago, 786 P.2d 486 (Colo. Ct. App. 1989).

[69] Sampson v. Weld County School Dist., 786 P.2d 488 (Colo. Ct. App. 1989).

[70] Seattle School Dist. #1 v. Department of Labor and Indust., 786 P.2d 843 (Wash. Ct. App. 1990).

[71] Lutz v. Jefferson Parish School Bd., 565 So. 2d 1071 (La. Ct. App. 1990).

[72] Mosley v. McGehee School Dist., 783 S.W.2d 871 (Ark. Ct. App. 1990).

Whether a teacher could be compensated for an eye injury he suffered during a Sunday softball game was the issue in a Florida case. The game had been sponsored by a "wellness committee" designed to benefit employees who participated on a voluntary basis. The teacher testified that while he knew participation was voluntary, he became involved for several reasons. Two fellow department chairmen with whom he closely worked had championed the program in his school. The board of education had chosen the school to pilot the program. Finally, the teacher believed the program fostered professionalism, communication, and good public relations, all of which affect the quality of the school. In affirming the denial of benefits, the court held that the activity was not in the course of the teacher's employment, and only indirectly of benefit to the school.[74]

While driving home from school after attending a conference in another city, a teacher was permanently disabled in a traffic accident. The finding that her injuries did not arise out of and in the course of her employment was upheld on appeal. Generally, under what is known as the "going and coming rule," if an employee is injured while going to or from the workplace the injury does not arise out of the course of the employment. By having attended a conference the teacher sought to bring the case within the commercial traveler exception to the rule. However, by stopping at her school, the teacher deviated from a route directly between the conference and her home. Therefore, the court did not find her injury compensable.[75]

A Missouri teacher was injured when the car in which she was travelling turned over while she was enroute to the state capital for the purpose of participating in "Lobby Day." Her request for workers' compensation benefits was denied and appeal was sought. In upholding the denial, the appellate court found it clear that the teacher's trip was not a function of her work. Lobbying, even for improvements in public education and increased public funding, did not come under the dual purpose or mutual benefit doctrine.[76]

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[73] Lorentzen v. Industrial Comm'n of Ariz., 790 P.2d 765 (Ariz. Ct. App. 1990).

[74] Hutchinson v. Dade County School Bd., 561 So. 2d 1291 (Fla. Ct. App. 1990).

[75] Reynolds v. School Dist. of Omaha, 461 N.W.2d 758 (Neb. 1990).

In an Ohio case, a teacher successfully appealed a denial of workers' compensation benefits. Having left her home early to stop at another school, the teacher was injured when she missed a step at the school and fell. The court sought to determine if the injury was received in the course of, and arising out of employment. In considering the totality of the circumstances, the court noted that the teacher stopped by the school to collect money for a "flower fund" used to provide expressions of sympathy and congratulations to school district employees. Furthermore, the stop was made on school district property minutes before the teacher's workday was to begin. In consideration of these facts, the injury was held compensable.[77]

A Wyoming school custodian was killed when he struck a light pole while trying to back his vehicle out of the school's parking lot at the completion of his shift. His truck had become stuck in the snow, and the accident occurred as he attempted to drive the vehicle while holding the door open. The denial of workers' compensation survival benefits was reversed on appeal. The court held that, although the custodian had completed his workday, the injury arose out of and in the course of his employment.[78]

Almost two years after resigning her position, a Pennsylvania special education teacher claimed that her psychiatric condition was caused by the abnormal working conditions she had experienced. She sought appeal of the Workmen's Compensation Appeal Board's decision denying her benefits. The appellate court explained that the claimant cannot rely solely on her own account of her working environment to meet the burden of showing that her injury was not caused by her subjective reaction to normal working conditions. There was no other witness to testify in support of her assertion that her working conditions were abnormal. Neither of her medical experts suggested there was any correlation between her injury and abnormal working conditions. Therefore the court upheld the ruling that the claimant had not sustained her burden of proof.[79]

A North Carolina cafeteria supervisor injured her back when she slipped and fell in a cafeteria freezer. She sought judicial review of the Industrial Commission's decision granting worker's compensation benefits. The court upheld the decision which allowed a 15% disability rating based on the testimony of the plaintiff's surgeon, rather than the 20% to 25% recommended by her treating physician. The Commission was seen as the sole

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76. Stansbarger v. Consolidated School Dist. #1, 796 S.W.2d 938 (Mo. Ct. App. 1990).
77. Fisher v. Mayfield, 551 N.E.2d 1271 (Ohio 1990). *See* Becker v. Clarkstown Cent. School Dist., 549 N.Y.S.2d 739 (App. Div. 1990). Workers' compensation board's summary judgment provided for the employer was reversed as there was a dispute whether the employee's injury was sustained one-half hour before reporting to work.
78. Archuleta v. Carbon County School Dist. No. 1, 787 P.2d 91 (Wyo. 1990).
79. Supinski v. Workmen's Compensation Appeal Bd., 577 A.2d 944 (Pa. Commw. Ct. 1990).

judge of the credibility of the witnesses, and the weight given to their testimony. Also, the plaintiff was not entitled to compensation for medical expenses she incurred with and under the direction of a doctor she chose to see without seeking approval of the commission.[80]

A teacher-claimant and school district-employer sought review of a compensation board's decision. The teacher claimed she had sustained neck and back injuries as a result of physical confrontations with students, and this contributed to her preexisting psychological disability. Additionally, she claimed that exposure to fumes from building roof repairs increased her chemical sensitivity. The court upheld the determination that the exposure to fumes was not a major contributing factor in the teacher's chemical sensitivity. However, the compensation board was reversed on its award of benefits for the neck and back injuries. According to the principal, the teacher had failed to report the confrontations which caused the injuries. Since the board did not explain why it believed the teacher's rendition of the events, that portion of the decision was remanded for reconsideration.[81]

ASSAULT and BATTERY

A North Dakota school superintendent, apparently angry with a teacher who was late getting to her classroom, become engaged in a physical altercation with her. At some point he picked the teacher up, carried her over his shoulder, and deposited her on a couch in the teacher's lounge. The parties differed on the extent of the fight from that stage. Subsequently, the teacher brought a personal injury action against the superintendent and school district. At trial, the jury found the superintendent unjustifiably assaulted the teacher, but while the action was within the scope of his employment, it was not found to amount to willful misconduct. That decision was reversed on appeal and the case remanded for a new trial. The court explained that if the jury correctly found the superintendent committed an unjustified assault, his actions would constitute willful misconduct as a matter of law.[82]

DEFAMATION

A group of Kentucky high school teachers brought an action to recover for libel and invasion of privacy in connection with a newspaper article about a meeting between parents and school officials. The article, which was distributed by Associated Press, reported that the meeting was called in response to the expulsion of a student for engaging in a fight with a teacher. Also reported was a discussion in which parents called for an investigation of "teachers having affairs with students." The teacher who had been involved in the fight with the student claimed that the article falsely implied that he had engaged in sexual misconduct thereby defaming him and violating his right to privacy. Twenty-seven other teachers from his school joined in the action claiming they had been defamed and their rights to privacy violated. The court held that the article did not defame the group of teachers as such an action would have required the libelous statements to apply identifiably to each member of the group. All the newspapers but one were dismissed from the case since they had simply relied on the wire service before printing the article. The action pertaining to the remaining newspaper and one reporter was left a matter for trial. Wording in the article was arguably seen to leave the impression that the fight and the sexual misconduct were somehow related.[83]

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[80] Forrest v. Pitt County Bd. of Educ., 394 S.E.2d 659 (N.C. Ct. App. 1990).

[81] Benson v. Multnomah County School Dist. #1, 789 P.2d 694 (Or. Ct. App. 1990).

[82] Binstock v. Fort Yates Pub. School Dist. No. 4, 463 N.W.2d 837 (N.D. 1990).

A California teacher alleged defamation in his suit against a student newspaper advisor and school district. In affirming the trial court's dismissal of the action, the appeals court examined each of the student statements under question. The accusation that the plaintiff was the "worst teacher" in the school was seen as a subjective judgment and simply an expression of anger or disgust. Calling the teacher a "babbler" was seen as an exaggerated expression conveying the student's disapproval of the plaintiff's speaking or teaching style. Finally, a headline that described the teacher as "terrorized" by a smoke bomb in his room fell into the category of rhetorical hyperbole. None of the statements was found actionable.[84]

INTENTIONAL INFLICTION of EMOTIONAL DISTRESS

An Illinois school bus driver sexually assaulted a kindergarten student on the way to school. The student's parents brought an action against the school district and bus company for the intentional infliction of emotional distress. The trial court's dismissal of the claim was upheld on appeal. The school district's and bus company's failure to investigate the bus driver's background did not constitute extreme and outrageous conduct. Additionally, the lack of investigation was not found intended to inflict emotional distress. Thus, the parents failed to state a claim.[85]

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[83] O'Brien v. Williamson Daily News, 735 F. Supp. 218 (E.D. Ky. 1990). *See* Beckham v. S.J. Durant, 387 S.E.2d 701 (S.C. Ct. App. 1989). In a teacher's action against a student for libel and slander, an award of $2,500 was not found excessive. However, see O'Neil v. Peekskill Faculty Ass'n, 549 N.Y.S.2d 41 (App. Div. 1989) where a school district's chief negotiator won a libel action against a faculty association which falsely accused him of uttering a racial slur during contract negotiations.

[84] Moyer v. Amador Valley Joint Union High School Dist., 275 Cal. Rptr. 494 (Ct. App. 1990).

PRODUCTS LIABILITY

In 1981, an Ohio school district filed suit against an asbestos manufacturer seeking to recover costs of removing asbestos-containing ceiling and fire-proofing products from various buildings.[86] The case developed into a huge suit eventually involving over 100 plaintiffs asserting various claims against numerous asbestos manufacturers and suppliers. Following a settlement, the district court dismissed the suit but a subgroup of the original litigants, eventually joined by fifty-seven new plaintiffs, brought claims against new defendants. Three consolidated interlocutory appeals were at issue in the case decided by the Fifth Circuit Court of Appeals.[87] The plaintiffs sought relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[88] They sought to establish that the sale of asbestos-containing building materials constituted "disposal" within the meaning of the statute. The court held that under no circumstances could the term "disposal," as used when referring to the discharge, dumping, leaking, or placing of solid wastes in the environment, encompass the commercial sale of asbestos-containing building products. Additionally, it was clear to the court that it was not the intent of the legislation to target legitimate manufacturers or sellers of useful products.

A South Carolina school board brought an action against a manufacturer whose ceiling materials contained asbestos. Damages were sought for the costs of inspection, testing, and the removal of the hazardous material from school buildings. The manufacturer argued that the trial court incorrectly ruled that asbestos property damage is recoverable in a tort cause of action of negligence. That decision was affirmed when the court held that the economic loss rule (which limits liability for a product defect only to the product itself) does not apply where other property damage is proven.[89]

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[85] Giraldi v. Lamson, 563 N.E.2d 956 (Ill. App. Ct. 1990).

[86] Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403 (E.D. Tex. 1988).

[87] Dayton Indep. School Dist. v. United States Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990).

[88] 42 U.S.C. § 9607(a).

[89] Kershaw County Bd. of Educ. v. United States Gypsum, 396 S.E.2d 369 (S.C. 1990).

CONSTRUCTION CONTRACTS

The low bidder for the maintenance and renovation of a school's soccer field brought suit against the school district to compel the award of the contract. The appellate court upheld the trial court's finding for the district. The failure to meet bid specifications based on a determination that the low bidder does not have the proper equipment to perform the specified work was seen as a rational basis for denying the award of the contract. The school board's decision was not found arbitrary and capricious as a bidder is not absolutely entitled to a hearing before its bid may be rejected.[90]

A New York contractor was the successful low bidder on a contract to paint portions of a middle school. In its advertising specifications, the school district failed to make notice of the prevailing wage requirements. After the contractor stipulated that its employees were due additional wages, suit against the district was brought to recover that added expense. In affirming the trial court's decision, the appellate court agreed that a school district is bound by notice requirements of the prevailing wage requirements. However, the contractor was not found to have a right of action against a school district. Such an action, making the public entity financially responsible for the underpayment, was seen as contrary to an enforcement scheme which places liability for violating wage requirements on the noncomplying contractor.[91]

The second lowest bidder on a contract for the construction of a school brought an action against a Louisiana school board claiming the board's award of the contract to the lowest bidder violated public contracts law. In finding against the construction company, the court explained that an unsuccessful bidder on a public contract who wishes to obtain relief because of the rejection of its bid must seek injunctive relief in a timely manner. This would be at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder and when corrective action could be taken practically by the public body. As the construction project was completed at the time of the hearing, the plaintiff failed to state a cause of action.[92]

Seventeen general contractors filed an action against a Kansas school district seeking a declaratory judgment that statute required the district solicit sealed bids before awarding a management services contract. The trial court's decision for the district was affirmed as the statute did not refer to "services" when describing the requirement for sealed bids.[93]

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90. *In re* K & M Turf Maintenance, 560 N.Y.S.2d 673 (App. Div. 1990).
91. Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist., 556 N.E.2d 1087 (N.Y. 1990). *See* Jacobsen, Morrin & Robbins Constr. Co. v. St. Joseph High School Bd. of Financial Trustees, 794 P.2d 505 (Utah Ct. App. 1990). School Board's appeal was moot due to the board's paying of judgment and mailing of satisfaction to the contractor.
92. Airline Constr. Co. v. Ascension Parish School Bd., 568 So. 2d 1029 (La. 1990).
93. D-I Constructors, Ltd. v. Unified School Dist. No. 229, 788 P.2d 289 (Kan Ct. App. 1990).

An unsuccessful bidder brought an action against the school board and successful bidder to enjoin a project to perform renovations and additions to two Louisiana schools. The court rendered the bid null and void and remanded the case for further proceedings. The successful bidder had failed to attach to the bid a corporate resolution form. The court explained that public bid laws, to ensure fair competition, require the form as a validation of the authority of a corporation to submit a bid on a particular project.[94]

A New York contractor, who had entered into a series of contracts to perform construction on city schools, sought to avoid delay damages. In finding against the contractor, the court explained that he had the burden of demonstrating that the delays were wholly unanticipated. The demonstration of increased cost as a result of delay was not found to have met that requirement.[95]

In another attempt to avoid delay damages, a general contractor claimed delays in the construction of a District of Columbia school were the result of the District breaching its warranty of commercial availability. Specifically, the contract called for the use of materials available from a single supplier who the contractor alleged could not furnish the materials in a timely fashion. The court held that the contractor was not relieved of the usual risks of nonperformance by subcontractors. Actions of the contractor and subcontractor were found to have caused the delay rather than any unavailability of materials.[96]

The general contractor for the construction of a high school was able to recover from a Georgia school board for claims of two subcontractors. The general contractor presented evidence to the court that any recovery from the school board would be passed on to the subcontractors pursuant to prior agreement of the parties.[97]

A West Virginia school board contracted with an architectural firm to design and supervise construction of a school. After serious structural damage became evident in the building, the board brought a suit for damages against the firm. Prior to the trial court's decision against the firm, two subcontractors settled with the school board. Appeal by the firm resulted in an affirmation of the lower court's decision. However, the amount of

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94. Stafford Constr. Co. v. Terrebonne Parish School Bd., 560 So. 2d 558 (La. Ct. App. 1990).

95. Manshul Constr. v. Board of Educ. of City of N.Y., 559 N.Y.S.2d 260 (App. Div. 1990).

- *See* Slutsky-Peltz Plumbing & Heating Co. v. Vincennes Community School Corp., 556 N.E.2d 344 (Ind. Ct. App. 1990). Prime contractors unsuccessfully appealed from an order compelling them to submit to arbitration to settle delay disputes.

96. Edward M. Crough, Inc. v. Department of Gen. Servs. of D.C., 572 A.2d 457 (D.C. Ct. App. 1990).

97. Raymer v. Foster & Cooper Inc., 393 S.E.2d 49 (Ga. Ct. App. 1990).

the judgment against the firm was to be reduced by the amount of the settlements from the subcontractors.[98]

The Supreme Court of Alabama reversed the decision by a lower court that an architect had committed a breach of contract by failing to adequately supervise construction of a school. The school board failed to present expert testimony regarding the standard of care imposed within the architectural profession for such weekly inspections as required by the contract. Thus, the board failed to prove that there was a breach of the agreement.[99]

A New York school district brought suit against an architect who provided services in connection with the installation of insulation in a school building. Shortly after the work was completed, condensation problems arose which resulted in extensive damage to the building. The denial of the architect's motion for dismissal based on notice requirements was upheld on appeal. The court held that by seeking the architect's advice as to the causes of the problems and possible solutions, an ongoing professional relationship was maintained serving to extend the notice of claim period.[100]

A New York board of education entered into an agreement for the construction of an elementary school. Specifications for the project included blasting to excavate the site. The state's Department of Education approved the plans which stipulated that the blasting would take place during normal business hours. However, the city cited fire regulations and halted the blasting. Eventually it was determined that the state had preemptive control over the construction of schools and the project was completed. The construction company then sought to recover delay damages from the city. They were successful in this effort as the court found the fire code enforcement by the city to be a discretionary act for which it could be held liable.[101]

A New York subcontractor sought appeal from two summary judgments which dismissed its claims against the board of education and the board's insurer. The school board had discharged the primary contractor alleging poor workmanship. As a result, the contractor allegedly breached its contract with the subcontractor. The decision exonerating the school board from direct liability was upheld as the subcontractor's delay of more than two years far exceeded the three month notice requirement. However, the mechanic's lien against the property of the school district was reversed and that claim was remanded for trial. The school district had hired a new contractor to complete the work and the mechanic's claim could not be ascertained until the work was completed.[102]

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[98] Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W. Va. 1990). *See* Board of Educ. of Charles County v. Plymouth Rubber Co., 569 A.2d 1288 (Md. Ct. Spec. App. 1990). Roof warranty was ambiguous and question of its meaning is a question for the jury.

[99] Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ., 559 So. 2d 168 (Ala. 1990).

[100] Greater Johnstown City School Dist. v. Cataldo & Waters, 551 N.Y.S.2d 1003 (App. Div. 1990).

[101] San Marco Constr. Corp. v. Aetna Casualty and Surety Co., 556 N.Y.S.2d 714 (App. Div. 1990).

A West Virginia contractor successfully appealed a summary judgment denying him additional compensation for excavation done beyond that specified under contract. In remanding the case for trial, the court held that where the contract is ambiguous, and issues of fact remain, summary judgment is ordinarily not proper.[103]

Additional compensation was denied in a New York case where a contractor attempted to recover for additional costs in connection with unanticipated extra work during construction. The change order price entered into between the contractor and the board of education was not found binding or enforceable until approved by the board of estimate.[104]

A Massachusetts school district filed petition to vacate an arbitration award made to a contractor. The trial court based its approval of the award on the fact that the contract had a "no damages for delay" clause. The court upheld the decision, explaining that arbitration is subject to a very narrow scope of review. Furthermore, when there is room for interpretation of a contract's boundaries, the issue properly lies within the broad authority of the arbitrator.[105]

CONSTITUTIONAL TORTS

Student Initiated Cases

An elementary school band teacher hit or tapped a student on the head with his grade book. From the record it is not clear why he did this. The student's parents brought an action against the teacher and principal alleging improper corporal punishment. The decision to discipline a student through excessive force can, according to the court, constitute an invasion of the child's fifth amendment liberty interest and a violation of substantive due process prohibited by the fourteenth amendment.[106] General issues of material fact were found, leading the appeals court to deny the defendant's motion to dismiss the constitutional claim. However, the action alleging the student's due process rights were violated by the principal's lack of supervision was dismissed.[107]

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[102] Rure Assoc. Inc. v. Dinenardi Constr. Corp., 917 F.2d 1332 (2d Cir. 1990).

[103] Ohio Valley Contractors, Inc. v. Board of Educ. of Wetzel County, 391 S.E.2d 891 (W. Va. 1990). *See* Owners Realty Management Constr. Corp. v. Board of Educ. of West Islip Union Free School Dist., 554 N.Y.S.2d 648 (App. Div. 1990). Issues of fact existed as to whether disputed work was within the scope of the original contract.

[104] Manshul Constr. Corp. v. Board of Educ. of City of N.Y., 551 N.Y.S.2d 497 (App. Div. 1990). *See* Board of Educ. Longwood Cent. School Dist. v. Hatzel & Buehler, Inc., 549 N.Y.S.2d 447 (App. Div. 1989). School board successfully stayed arbitration in which contractor sought to recover additional costs incurred by delays.

[105] Plymouth-Carver Regional School Dist. v. J. Farmer & Co., 553 N.E.2d 1284 (Mass. 1990).

[106] Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).

In an attempt to maintain discipline, the aide to a New Mexico high school gym teacher broke a student's arm when he threw the student to the floor. The student's civil rights action against the teacher and aide was unsuccessful and that decision was upheld on appeal. The district court explained that the right the student claimed was violated is not simply to be free from random unauthorized deprivations of liberty. Rather, it is to be free from such deprivations in the absence of adequate post-deprivation remedies. In this case, federal judges in New Mexico had split on the question of whether the state provided adequate remedies for students whose procedural due process rights were violated by excessive punishment. Because of this uncertain state of law, the court found that the defendant's actions could reasonably have been thought to be consistent with the right they were alleged to have violated.[108]

In a Pennsylvania case a student and his mother alleged a violation of the student's civil rights when he allegedly was shaken, thrown into his seat, and struck by a school bus driver. In dismissing the case, the court found that the alleged action had a plainly legitimate purpose, that of maintaining order on a moving school bus. Second, the action did not go so far beyond the bounds of decency that there was no relation between the force allegedly used and the needs of the situation. Third, the injuries were not such as would be associated with a malicious, sadistic beating. Finally, there was no allegation that the school board was aware of any repeated use of excessive force.[109]

A Wisconsin teacher's actions and a school district's policy regarding the use of physical force were examined in a case where the teacher either pushed or threw a high school student into a blackboard. The student alleged violation of his rights under the fourth, eighth, and fourteenth amendments. The defendant teacher, principal, superintendent, and school district's motion for dismissal of the claim was granted in part and denied in part. Seeing the issue as one of possible excessive corporal punishment, the court explained that the eighth amendment protection against cruel and unusual punishment is not to be used to scrutinize its imposition in public schools.[110] While the student was seized within the literal meaning of the term when he was pushed or thrown against the blackboard, this was not found to warrant the invocation of the fourth amendment right to be free

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106. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).
107. Meyer v. Litwiller, 749 F. Supp. 981 (W.D. Mo. 1990).
108. Coriz v. Martinez, 915 F.2d 1469 (10th Cir. 1990).
109. Anderson v. Everett Area School Bd., 732 F. Supp. 39 (W.D. Pa. 1989).
110. Ingraham v. Wright, 430 U.S. 651 (1976).

from unreasonable seizure of one's person. The school district's policy did not condone random acts of violence or use of physical force, thus the policy was not seen to have been a moving force behind a fourteenth amendment due process violation. However, sufficient facts of physical and emotional injury to the student were set forth to create a jury question precluding dismissal of the teacher's alleged violation of the amendment's guarantee of substantive due process.[111]

A Georgia high school student sought damages from her school district for alleged intentional gender-based discrimination following a sexual relationship with her coach/teacher. The action was brought under title IX of the Educational Amendments of 1972.[112] The district court's dismissal of the action was upheld on appeal. The court explained that title IX was patterned after title VI of the Civil Rights Act of 1964, and that cases involving them could be discussed interchangeably.[113] The court looked to the Supreme Court for guidance and determined that while there could be no cause of action for compensatory damages for unintentional discrimination, the question of such an action for intentional discrimination was open.[114] Following binding circuit precedent, and with no such precedent from the Supreme Court, the court found that damages are unavailable under titles VI and IX.

Gender-based discrimination also was at issue when a former Pennsylvania student brought an action to recover for dismissal from her school's chapter of the National Honor Society. The district court found as fact that she was dismissed because of premarital sexual activity and not because of gender discrimination. The Third Circuit Court of Appeals upheld that decision, but remanded the case for the limited purpose of the consideration of evidence of premarital sex by a male member who was not dismissed from the society. The court added that should the dismissal be found motivated by a discriminatory intent that violates title IX, the district court should consider the possibility of compensatory damages.[115]

Six Missouri students brought a civil rights action against the board of education alleging that their teacher had sexually abused them and that the board had failed to report the abuse, and refused to receive, investigate, act upon, or otherwise prevent or rectify the situation. The board's motion for summary judgment was granted. The principal's knowledge that two students had filed complaints of sexual abuse nine years apart was not found to have constituted notice to the school board. Furthermore, the teacher's alleged abuse of the students did not amount to a pattern of unconstitutional misconduct necessary to establish liability of the board in a civil rights action.[116]

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[111] Thrasher v. General Casualty Co. of Wis., 732 F. Supp. 966 (W.D. Wis. 1990).

[112] Codified as amended at 20 U.S.C. §§ 1681-1688 (1988).

[113] Except for the substitution of the word "sex" in title IX to replace the words "race, color, or national origin" in title VI, the two statutes are substantially alike in intent and redress.

[114] Guardian Ass'n v. Civil Servs. Comm'n, 463 U.S. 582 (1983).

[115] Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990).

Another Missouri case examined whether a school district had been deliberately indifferent to students' constitutional rights. The district had received reports of isolated incidents of misconduct by a school bus driver, and ultimately the driver was arrested for sexual abuse. However, since the court held that the district did not have notice of a pattern of unconstitutional acts, no tacit authorization or deliberate indifference of the students' constitutional rights was found.[117]

A civil rights action was brought against an Oklahoma school district for acts of sexual molestation an elementary school teacher committed against three students. Ten years before he was hired, the teacher had been convicted of sodomy in Texas. The trial court entered a jury decision for the students and the district appealed. In reversing the decision, the court held the acts of molestation to be too remote a consequence of the school district's hiring and investigation policies three years earlier to impose liability. Also, the teacher was not found to have been acting under the color of state law when he molested the students. The acts were committed in the teacher's home during summer vacation while the students were engaged in fund-raising activities for a nonschool basketball camp.[118]

A Louisiana student brought a section 1983 action against the school board and school officials after officials rejected the valedictory speech the student planned to give at her graduation ceremony. The Fifth Circuit Court of Appeals upheld the trial court's dismissal of the action. This conclusion was reached without examining the constitutional issues. The court concluded that even if the case were remanded for trial, and rights were found to have been violated, the same conclusion would be reached. That is, money damages cannot be imposed for any constitutional wrong under section 1983 in connection with censorship.[119]

Two grammar school students and their parents brought suit claiming civil rights violations by various state and local school employees during a child abuse investigation. The dismissal of the action was upheld on appeal. The Illinois court held that school personnel, who removed the students from their classroom and subjected them to questioning and physical examination to determine if they were abused, were entitled to qualified immunity from the civil rights claims. Furthermore, the actions of the school employees were not found to have violated any clearly established consitutional rights of the students.[120]

When a Texas woodshop instructor stepped into a small storage room for additional supplies during class, a student sustained injury. The teacher successfully sought to have the action for damages against him dismissed. The court held that the statute conferring immunity on professional school district employees, though intended to bar tort liability, did not bar claims arising under due process clauses of the state and federal constitutions. However, the teacher was not found to have acted with callous indifference to the student's rights when he stepped into the storage room.[121]

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[116] Thelma D. v. Board of Educ. of St. Louis, 737 F. Supp. 541 (E.D. Mo. 1990).

[117] Jane Doe v. Special School Dist. of St. Louis County, 901 F.2d 642 (8th Cir. 1990).

[118] D.T. by U.T. v. Independent School Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990).

[119] Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990).

[120] Landstrom v. Illinois Dep't of Children and Family Servs., 892 F.2d 670 (7th Cir. 1990).

Employee Initiated Cases

After she was dragged from her classroom by her principal, an Ohio teacher alleged that she suffered embarrassment, humiliation, fear, anxiety, and loss of sleep and appetite. A federal cause of action was sought under title VII of the Civil Rights Act of 1964 and deprivations of her fourth and fourteenth amendment rights. She also alleged state law claims for assault and battery, intentional infliction of serious emotional distress, negligence, and libel. The principal's actions, which took place in front of the teacher's students, involved pushing her, grabbing her by the shoulder and arms, and in the process of pulling her from the room, injuring her foot and causing her nylons to be ripped. The district court found that the alleged actions by the principal were not of constitutional magnitude and did not involve deadly force, thus failing to establish a section 1983 claim. Furthermore, the teacher's complaint failed to specify whether individuals were being sued in official, personal, or individual capacities. Finally, the court stated that the issues of human dignity and standards of decency raised in the case were serious, and if proven would justify appropriate relief in a court of general jurisdiction.[122]

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[121] Moore v. Port Arthur Indep. School Dist., 751 F. Supp. 671 (E.D. Tex. 1990).
[122] Coleman v. Wirtz, 745 F. Supp. 434 (N.D. Ohio 1990).

6

SPORTS

Linda A. Sharp

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INTRODUCTION

This Chapter includes all cases, at either the K-12 or higher education level, which deal with student-athletes, coaches, athletic directors, athletic associations, and booster organizations. However, no case law is discussed which pertains to physical education instruction.

ELIGIBILITY

This section contains ten cases: one involved an admissions issue; two dealt with students who were ineligible because of academic problems; two others were brought by students who were involved in disciplinary matters; two dealt with transfer restrictions; one questioned a restriction on outside participation; and two involved drug testing as a prerequisite to athletic participation.

Admissions

A father acting *pro se* lacked standing to sue the NCAA after his emancipated son was denied admission to a state university. He had no right to bring a lawsuit to redress any alleged injury inflicted upon a third party (his son).[1]

Academic Issues

A lower court dismissed a high school wrestler's claim that his exclusion from the wrestling team because of his failure to maintain a satisfactory grade point average (i.e., a 2.0 GPA in five of six classes) constituted a violation of his civil rights. The appellate court affirmed on the basis that the student's interest in participating in wrestling was not a property right and the school board's policy did not exceed the reasonable and legitimate interests of the school system.[2]

The plaintiff, a highly-recruited high school football player, received an ACT score of ten (out of a possible thirty-five) which was not sufficient to allow him to participate in intercollegiate football under the NCAA Proposition 48 requirements. When he retook the ACT six months later he received a score of twenty. The ACT procedures automatically note scores which have increased by more than six points in a twenty-month period. After a thorough investigation of the matter, which involved allowing plaintiff the opportunity to explain the scores or to retake the test if

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1. Peebles v. National Collegiate Athletic Ass'n, 723 F. Supp. 1155 (D.S.C. 1989), *aff'd without opinion*, 887 F.2d 1080 (4th Cir. 1989).
2. Thompson v. Fayette County Pub. Schools, 786 S.W.2d 879 (Ky. Ct. App. 1990).

he desired, the ACT administration canceled plaintiff's score which made him ineligible to play football at the University of Alabama.

The plaintiff's suit alleged breach of contract, the denial of due process, the infliction of severe emotional distress, and defamation. Summary judgment for the defendant was affirmed by the Eleventh Circuit as it held that: (1) the ACT was not a state actor; (2) there was no breach of contract since the ACT had the right to cancel the score and it acted in good faith in doing so; (3) there was no outrageous conduct by the ACT since it had made a concerted effort to come to a just resolution; and (4) the allegedly wrongful communications were privileged (i.e., the information was only disseminated to officials at plaintiff's high school).[3]

Discipline

A student who was cut from the baseball team at a community college brought a section 1983 action alleging a violation of his liberty and property rights. In a ruling on the defendant college's motion for summary judgment, the court held that there was no liberty interest in playing baseball. However, there was a conceivable property interest since the player had some financial loss due to fines paid for team rules violations.

The community college's motion for summary judgment was denied in regard to plaintiff's claim that the baseball coach's practice of doing "cup checks" was an assault. There was a question of fact regarding whether the player felt apprehension as the coach approached him with a bat to determine whether he was wearing the designated protective attire.[4]

A high school wrestler was suspended from school and from the team because he attended practice while "under the influence" of alcohol. Earlier in the day the student had attended a college visitation day at which he consumed two beers. When he returned to practice that afternoon the assistant coach smelled alcohol on his breath and the coach obtained related information from the student. Thereafter, the principal suspended the student. Both the trial court and the court of appeals found that the high school policy, which defined when a student was "under the influence," was overbroad. However, the Ohio Supreme Court upheld the policy since it found that the definitional elements of the policy were only the starting point in the investigation by administrators.[5]

Limitation on Years of Eligibility

A senior athlete was ruled ineligible to participate in football because he exceeded the number of years a student may attend school and still participate in athletics, according to the rules of the high school athletic association. This rule, which was instituted to prevent the practice of redshirting, was applied against the plaintiff even though he violated the rule only because he had failed the ninth grade. The West Virginia Supreme Court of Appeals held that the rule was applied unreasonably because it refused to consider the circumstances surrounding why the student had been held back.[6]

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[3] Langston v. ACT, 890 F.2d 380 (11th Cir. 1989).

[4] Lesser v. Neosho County Community College, 741 F. Supp. 854 (D. Kan. 1990).

[5] *In re* Suspension of Huffer from Circleville High School, 546 N.E.2d 1308 (Ohio 1989).

Transfer

In an Alabama case, a ninth grader transferred from a private school to a public school after a realignment of school districts occurred due to a desegregation case. The student's transfer, however, was purely voluntary and was not a result of recruiting. Although the lower court enjoined the enforcement of the transfer rule which prevented the student from participating in athletics for one year after the transfer, the state supreme court reversed on the basis that the court should not interfere with the decision of an athletic association absent fraud, lack of jurisdiction, collusion, or arbitrariness.[7]

The parents of a handicapped student sought a preliminary injunction under the Education of the Handicapped Act (EHA) restraining the secondary school athletic association from applying a transfer rule. The student had transferred from a parochial school to a public high school and had been found, after the transfer, to have a learning disability. The Sixth Circuit Court of Appeals dismissed the suit because the parents had not exhausted all available administrative remedies for resolving disputes about a handicapped child's educational program.[8]

Thereafter, the IEP proposed for the student did not include athletic participation. On this issue an administrative law judge held that the athletic association had discriminated against the student by failing to grant a hardship exception. The parents were entitled to a preliminary injunction preventing the athletic association from interfering with the implementation of the ALJ's order allowing the student to participate in athletics.[9]

Outside Participation

An Ohio High School Athletic Association rule prohibited soccer players from participating in both spring independent soccer and fall interscholastic soccer. The federal district court upheld the rule since it did not violate rights of association, due process, or equal protection.[10] The Sixth Circuit Court of Appeals affirmed but it did not address the merits of the constitutional claims since it found, based on precedent concerning the status of the NCAA, that the high school athletic association was not a state actor.[11]

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[6] Hamilton v. West Virginia Secondary Schools Activities Comm'n, 386 S.E.2d 656 (W. Va. 1989).

[7] Alabama High School Athletic Ass'n v. Scaffidi, 564 So. 2d 910 (Ala. 1990).

[8] *See* The Yearbook of Education Law 1990 at 158, Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989).

[9] Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990).

Drug Testing

Students in grades 6-12 who wished to participate in school-sponsored extracurricular activities had to consent to a drug testing program, which consisted of urinalysis at the beginning of the semester and random tests throughout the year. The federal district court granted a senior student's permanent injunction as it held the program to be unconstitutional.

First, the *Von Raab* decision[12] left no doubt that urinalysis is a search under the fourth amendment. Furthermore, individualized suspicion is necessary in ordinary circumstances in order to conduct a search. The school district's unfounded allegations that those who participated in extracurricular activities were more likely to use drugs or were more likely to sustain injury due to drugs did not constitute the compelling need necessary to undertake a search without reasonable suspicion.[13]

An injunction permanently enjoining the NCAA from enforcing its drug testing program for student-athletes was upheld by an appellate court. The court's ruling, based on the right to privacy set forth in the California Constitution, focused on the fact that the NCAA could not establish "compelling interests" in its testing program. Furthermore, the California Constitution does not require that a party be a state actor; its prohibitions reach private, voluntary associations as well.[14]

EQUALITY OF PROGRAMS

General

A high school student brought a title IX action seeking damages for intentional gender-based discrimination in connection with a sexual relationship with her coach. The Office of Civil Rights had found a title IX violation, but closed the investigation after the school district agreed to affirmative action. The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the complaint on the basis that damages are not recoverable under a title IX action.[15]

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[10] *See* The Yearbook of Education Law 1990 at 159, Burrows v. Ohio High School Athletic Ass'n, 712 F. Supp. 620 (S.D. Ohio 1988).

[11] Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989).

[12] National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

[13] Brooks v. East Chambers Consol. Indep. School Dist., 730 F. Supp. 759 (S.D. Tex. 1989).

[14] Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402 (Ct. App. 1990).

Girl to Play on Boys' Team

A female high school student was prevented from participating on the boys' baseball team by a rule of the Secondary School Activities Commission (SSAC) which prohibited females from participating on a male team if the school had a separate team in a related sport (e.g., softball and baseball). The lower court upheld the validity of the rule in plaintiff's suit which was based on violations of equal protection under both the federal and state constitutions and a violation of the state Human Rights Act.

The West Virginia Supreme Court of Appeals reversed as it found that the rule violated the student's equal protection rights under the federal and state constitutions. Separate sports are permissible if the teams are substantially equivalent; however, the court found, after an extensive review of the rules, skills, and equipment used in baseball and softball, that this was not the case. This rule also violated the student's rights under the Human Rights Act. The SSAC is considered to be a "place of public accommodation" since its entire activity is permeated with a general public interest through open spectator invitation to its sporting events which are generally conducted at public facilities.[16]

The next two cases dealt with the recovery of attorney fees. A female high school student was prohibited from playing on the boys' soccer team by the rules of the conference and the high school athletic association. The plaintiff successfully obtained a temporary restraining order allowing her to play. However, the next year her complaint was dismissed as moot since she chose to play on the newly-formed girls' soccer team. The plaintiff was not considered to be a prevailing party for the purpose of recovering attorney fees since the restraining order was not a favorable ruling on the merits.[17]

In a case from New Jersey, a female high school student filed a complaint with the Commissioner of Education after she was barred from participating on her school's football team. A consent order was granted which allowed her to participate. On the issue of the recovery of attorney fees, the state Supreme Court held that the Commissioner of Education was not authorized to award counsel fees in education discrimination proceedings. However, the plaintiff could seek attorney fees before the Division on

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[15] Franklin v. Gwinnett County Pub. Schools, 911 F.2d 617 (11th Cir. 1990).

[16] Israel v. West Virginia Secondary Schools Activities Comm'n, 388 S.E.2d 480 (W. Va. 1989).

[17] Libby v. South Inter-Conference Ass'n, 728 F. Supp. 504 (N.D. Ill. 1990).

Civil Rights since these fees are within its authority and the Division on Civil Rights and the Commissioner of Education have concurrent jurisdiction in education discrimination cases.[18]

Boy to Play on Girls' Team

A male high school student brought a section 1983 action challenging the rule of the state interscholastic association which restricted volleyball competition to single-sex teams. Summary judgment for the defendant was affirmed by the Ninth Circuit Court of Appeals as it held that the rule's purpose of preventing females from being displaced in interscholastic competition was substantially related to the goals of redressing past discrimination against females and promoting equality of athletic opportunities between the sexes.[19]

In a case out of Colorado, a male high school senior filed a section 1983 action because he was prevented from participating on the girls' gymnastics team. This case was filed as a companion case with *Rowley* in which a male sought to play on a girls' volleyball team.[20] The plaintiff, in this case, obtained a preliminary injunction which enabled him to participate in gymnastics his senior year. Thereafter, the claim became moot and the case was dismissed. The Tenth Circuit, in denying plaintiff's claim for attorney fees, held that although plaintiff was a prevailing party, it would be unjust to allow the award of fees because, if the case had not been dismissed as moot, the relief which plaintiff requested would have been reversed. The *Rowley* case with identical issues was reversed by the appellate court due to the use of an incorrect legal standard by the district court.[21]

TORT

In 1990, there were twenty-four tort cases dealing with sport. Of these cases, five were intentional torts. Of the eighteen negligence cases, sixteen dealt with participants and two with concerned spectators. One case dealt with educational malpractice.

Intentional

Assault. A student-athlete assaulted a fellow student at a beer party in a dorm which led to a lawsuit against the university for its alleged failure to adequately supervise the party. The acts of the student-athlete, who had previously assaulted a residence hall advisor, did not constitute a "dangerous condition of the property." Furthermore, the university had no duty to supervise adult college students who were voluntarily drinking beer at a dorm party.[22]

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[18] Balsley v. North Hunterdon Regional School Dist. Bd. of Educ., 568 A.2d 895 (N.J. 1990).

[19] Clark v. Arizona Interscholastic Ass'n, 886 F.2d 1191 (9th Cir. 1989).

[20] *See* The Yearbook of Education Law 1989 at 160, Rowley v. Members of the Bd. of Educ., 863 F.2d 39 (10th Cir. 1988).

[21] Dahlem v. Board of Educ. of Denver Pub. Schools, 901 F.2d 1508 (10th Cir. 1990).

Elementary school students were sexually molested by a teacher/coach during the summer vacation period as they engaged in fund-raising activities for a summer basketball camp. There was no liability by the school district since the only connection between the district and the basketball camp was that the district approved of the use of some of its facilities for camp activities and fund-raising and allowed the distribution of promotional materials on its property.[23]

An insurer brought an action seeking a declaration that the homeowner's policy which it issued to a teacher/coach did not provide coverage for claims arising from the teacher/coach's sexual relationship with a student. The coach had an eighteen month relationship with a high school student who was on his softball team. Even though the actions of the coach were not illegal, the appellate court inferred an intent to harm in his actions; therefore, his behavior was excluded from coverage under the "intentional acts" language of the policy.[24]

Defamation. An assistant basketball coach at a Division I university sued a newspaper for defamation regarding allegations of recruiting violations by the plaintiff. The Kentucky Supreme Court held that the coach was not a limited purpose public figure since he was not involved in a particular and identifiable public controversy. Therefore, actual malice by the newspaper need not be shown.[25]

The United States Supreme Court dealt with the "opinion" exception to the law of defamation in this case brought by a high school wrestling coach. He asserted that he was defamed by a sports reporter who accused him of perjury in testimony given at a high school association hearing relating to an altercation at a wrestling match. The Ohio Supreme Court held that the newspaper was protected by the "opinion" exception. However, the United States Supreme Court reversed as it held that an expression of opinion may be defamatory if the language contains a factual connotation which can be proved true or false.[26]

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[22] Crow v. State, 271 Cal. Rptr. 349 (Ct. App. 1990).

[23] D.T. by M.T. v. Independent School Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990).

[24] Allstate Ins. Co. v. Calkins, 793 P.2d 452 (Wash. Ct. App. 1990).

[25] Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990).

[26] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990).

Negligence

Participants. A club team rugby player who became a paraplegic because of injuries sustained in a tournament at defendant university alleged negligence. Summary judgment was affirmed on behalf of the university as the court held that, in the context of a club sport, the university had no affirmative duty to ascertain the level of fitness or preparedness of visiting clubs participating in a tournament.[27]

Summary judgment was affirmed for defendant college after a student who was injured in an intramural soccer game sued alleging negligent supervision. The fact that plaintiff knew that the opposing team played in a rough manner did not impute this knowledge to the college. Furthermore, plaintiff assumed the risk since the injury sustained was a reasonably foreseeable consequence of playing a high contact game such as soccer.[28]

Three cases dealt with the applicability of a state's recreational use statute/exception to the tort claims act. In the first case, from Nebraska, after the estate of a scuba diver brought a wrongful death action against the university for its negligence in supervising the indoor pool in which decedent drowned, the defendant failed to convince the court that the action was barred by the state's Recreation Liability Act. This Act was meant to encourage the use of land for outdoor recreational use and was not applicable to the university's indoor pool.[29]

The second case, from New York, concerned a child who slid down a snow-covered slope on school property while riding on an inflated innertube. The child fell from the innertube and suffered brain damage from impact with snow and ice. The court held that the activity engaged in was ''sledding'' as the term is used in the recreational use statute; therefore, the school district was immune from suit.[30]

The third case, from Kansas, dealt with the question of recovery by a high school football player, who was injured as he ran from the practice field to the locker room. The coach directed the players to run in the dark to the locker room after practice. The student slipped in a drainage area and hurt his back. The Kansas Supreme Court held that it was irrelevant whether the injury resulted from negligent supervision or from an artificial condition of the premises. The recreational use exception to the state tort claims act was applicable because the injury resulted from the *use* of the property.[31]

Two cases from Pennsylvania illustrate the applicability of the real estate exception to immunity. The ''dangerous condition of the realty'' exception to sovereign immunity was not applicable in a case in which

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27. Fox v. Board of Supervisors, 559 So. 2d 850 (La. Ct. App. 1990).
28. Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989).
29. Cassio v. Creighton Univ., 446 N.W.2d 704 (Neb. 1989).
30. Gruber v. Fairport Cent. School Dist., 556 N.Y.S.2d 965 (Sup. Ct. 1990).
31. Nichols v. Unified School Dist. No. 400, 785 P.2d 986 (Kan. 1990).

an eighteen-year-old nonswimmer with cerebral palsy drowned in a university's Recreation for Exceptional Citizens Program since the allegations really related to the failure to supervise and not to an artificial condition or defect of the land itself.[32]

In a similar construction of this exception, a high school student who was injured in a slip and fall on school district property while participating in a district-sponsored race, was not able to state allegations which fell within the real estate exception. Exceptions to the rule of immunity must be narrowly interpreted.[33]

The Illinois Court of Claims has exclusive jurisdiction over a lawsuit, brought by a university gymnast who suffered a knee injury, against two athletic directors, the gymnastics coach, and the trainer for alleged negligence in the performance of their duties as university employees. Since the defendants acted within the scope of their authority and not in violation of law, there was no jurisdiction outside of the Court of Claims.[34]

A track team met after practice to go to a pizza parlor for an end-of-the-year outing. One of the athletes was seriously injured as the coach's van, driven by the assistant coach, was hit by a truck which failed to stop at an intersection. The issue was whether the insurance coverage which was purchased by the school district to cover interscholastic athletic participation was applicable in this situation. The Washington Court of Appeals found that there was coverage because the pizza party was an "activity" recognized by the state interscholastic activities association. A practice or "turnout" may encompass a morale-building activity such as the pizza gathering planned in this case.[35]

The plaintiff's son was battered by an opposing player in a high school basketball game. The plaintiff alleged that the referees were negligent in failing to protect his son and that the negligence of the referees should be imputed to the school district. The school district's motion for summary judgment was granted; *respondeat superior* cannot be imposed upon the school district since it exerted no control over the manner in which an individual officiates.[36]

Four cases from New York dealt with various aspects of negligence law. First, a student allegedly sustained injury as he fell while playing kickball. The student's application to serve late notice of the claim against the school district was denied. The school had no record of the injury and the defendant would be prejudiced by allowing this claim.[37]

A softball player was injured while she caught for a pitcher during practice in a gymnasium. The thirteen-year-old student was hit in the face by a pitch and she was not wearing a facemask, contrary to safety instructions in the high school association handbook. On a motion by defendant for summary judgment, the trial court held that there were genuine issues of material fact regarding whether the defendants had exercised reasonable care to protect the student from any unassumed, concealed, or unreasonably incurred risks during practice. The appellate court affirmed the denial of summary judgment.[38]

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[32] Musheno v. Lock Haven Univ., 574 A.2d 129 (Pa. Commw. Ct. 1990).

[33] Farber v. Pennsbury School Dist., 571 A.2d 546 (Pa. Commw. Ct. 1990).

[34] Healy v. Vaupel, 549 N.E.2d 1240 (Ill. 1990).

[35] Odessa School Dist. No. 105 v. Insurance Co. of Am., 791 P.2d 237 (Wash. Ct. App. 1990).

[36] Kennel v. Carson City School Dist., 738 F. Supp. 376 (D. Nev. 1990).

[37] Salyer v. Valley Cent. School Dist., 558 N.Y.S.2d 746 (App. Div. 1990).

A student fell on a patch of ice in a schoolyard while he was playing touch football prior to the start of the school day. The jury found that the school district was negligent in failing to maintain the schoolyard in a reasonably safe condition and in permitting unsupervised play. The jury also found that the student assumed the risk in playing on this icy surface but did not reduce the award of over $4 million because of plaintiff's conduct. The appellate court ordered a new trial to apportion damages based on the student's assumption of risk.[39]

A college student fell in a hole alleged to be several feet wide and several inches deep, while playing intramural football. The university moved for summary judgment arguing that the student had assumed the risk. The court denied the motion, however, because there were genuine issues of fact regarding whether the hole in the field was typical of the normal terrain for football or whether it was an unreasonable, unnecessary, and unforeseen addition to the normal hazards of the game.[40]

A middle school football player was injured in a fight with a teammate after practice. A complaint was brought alleging improper supervision by the school district and by the teammate's mother. The trial court's dismissal of the complaint was affirmed because the plaintiff had voluntarily entered into the fight and there was no support for plaintiff's contention that the teammate's mother had knowledge of her son's vicious propensities.[41]

A football player who was injured in a summer weight training program which was supervised by two high school coaches sued the superintendent, school board members, and the coaches for negligence. Summary judgment was granted to all defendants on the basis of sovereign immunity. The coaches were engaged in a discretionary function since they were exercising judgment in supervising athletic training.[42]

Spectators. The plaintiff was injured when the student manager of the volleyball team wheeled the volleyball stand onto the gym floor and the stand separated from the support and landed on the plaintiff's foot. The action against the school district was barred because plaintiff did not commence the action timely. The action against the student was also dismissed because she was considered to be an "employee" of the school for the purposes of the state's tort immunity act. Even though the student manager was a volunteer, there was no reason not to protect her when a janitor engaged in the same activity would have immunity as an employee.[43]

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[38] Parisi v. Harpursville Cent. School Dist., 553 N.Y.S.2d 566 (App. Div. 1990).

[39] Chan v. Board of Educ. of City of N.Y., 557 N.Y.S.2d 91 (App. Div. 1990).

[40] Henig v. Hofstra Univ., 553 N.Y.S.2d 479 (App. Div. 1990).

[41] Borelli v. Board of Educ., 550 N.Y.S.2d 120 (App. Div. 1989).

[42] Gasper v. Freidel, 450 N.W.2d 226 (S.D. 1990).

A seventeen-year-old was hit in the eye with a tennis ball as he stood inside the fence of the tennis court watching a match. There were bleachers outside the fence, but the plaintiff chose to stand inside. The appellate court affirmed summary judgment for the defendant school district as it held that there was no duty owed to the plaintiff who was sufficiently mature to recognize the obvious dangers of standing inside the fence.[44]

Educational Malpractice

A former basketball player asserted a number of tort and contract claims against the university which recruited him although its representatives knew that he was educationally unprepared to attend the school. The federal district court, as it granted defendant's motion to dismiss, denied the availability of tort claims in educational malpractice and negligent infliction of emotional distress. Also, the court was unable to find the breach of an express contractual provision which would give rise to a cause of action.[45]

EMPLOYMENT

Ten cases which dealt with employment issues were decided in 1990. Four of those cases involved adverse employment decisions, two concerned contract disputes, one case pertained to race discrimination, one case dealt with workers' compensation and two cases related to first amendment issues.

Adverse Employment Decisions

A terminated football coach was unsuccessful in his wrongful discharge action against the university and its president. As an at-will employee, the plaintiff had no action available for wrongful discharge. Additionally, he was not entitled to a pretermination hearing since he had no property interest in his position.[46]

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43. Sunderland v. Tri-City Community Unit School Dist. No. 1, 549 N.E.2d 992 (Ill. App. Ct. 1990).
44. Chareas v. Township High School Dist. No. 214, 553 N.E.2d 23 (Ill. App. Ct. 1990).
45. Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).
46. Frazier v. University of D.C., 742 F. Supp. 28 (D.D.C. 1990).

A former university baseball coach brought a wrongful discharge action against the university and its athletic director. Based on language in university policies, there were material issues of fact regarding the existence of an implied in fact agreement not to terminate except for good cause.[47]

A teacher/coach who had taught for nine years was charged with certain irregularities while giving an exam. The plaintiff teacher was not fired but he was transferred to another school where he continued to teach but was given no coaching assignments. The plaintiff's fourteenth amendment claims were not upheld because a reassignment was not a sufficient change in status to violate a constitutionally protected liberty interest. Furthermore, the plaintiff had no protected property interest in continuing to teach and coach at just one location.[48]

In a case out of South Dakota, a tenured teacher was relieved of his basketball coaching assignment. The coach was not given notice of nonrenewal by the date mandated under the Continuing Contract Law (CCL). The state supreme court found that the notice provisions of the CCL were applicable to coaching contracts. Coaching is a teaching assignment and all coaches have to be persons certified as teachers; therefore, a coach is a teacher entitled to the benefits of the CCL.[49]

Contract Disputes

The board of education posted a position announcement for a "physical education teacher and athletic trainer." The plaintiff applied for the teaching position, but not for the athletic trainer opening. When another person was hired for the dual role, the plaintiff filed a grievance alleging that the job posting was an improper joinder of employment positions which violated West Virginia law. The state high court agreed with the plaintiff as it held that the position of athletic trainer was extracurricular and required a separate contract of employment.[50]

The plaintiff was employed as an athletic director and football coach; he taught no classes in the 1988-89 school year. In 1989-90 the district assigned the plaintiff to teach two classes as well as to continue to serve as coach and athletic director. The plaintiff sought an injunction alleging that the assignment of additional duties was a breach of contract and that the reassignment provision in the employment contract was a contract of adhesion. The appellate court found that the district was within its rights in assigning the teaching duties. Also, there was not a reassignment at issue here; the plaintiff was simply assigned additional duties. The court also noted that the "aggrieved" plaintiff was to receive the largest pay increase in the district.[51]

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[47] Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230 (Ct. App. 1990).

[48] Thomas v. Smith, 897 F.2d 154 (5th Cir. 1989).

[49] Reid v. Huron Bd. of Educ., 449 N.W.2d 240 (S.D. 1989).

[50] Cruciotti v. McNeel, 396 S.E.2d 191 (W. Va. 1990).

Discrimination

Race. In Texas, white and Hispanic football coaches brought a section 1983 action after they were reassigned from the varsity football team to the sophomore team so that black coaches could be appointed to the varsity staff. The federal district court held that this reassignment violated the equal protection clause and plaintiffs' motion for summary judgment was granted.[52]

The federal district court then dealt with the remaining issues of additional injunctive relief and monetary damages. Since the plaintiffs did not suffer any loss of wages, they were awarded $1 each for the equal protection violations. However, they were entitled to recover $5,000 each for their mental distress and anguish. No further injunctive relief was necessary since one coach had been reinstated and the other coach withdrew his request for reinstatement.[53]

Workers' Compensation

A community college instructor and coach of racket sports who sustained a work-related shoulder injury was unable to show that he was totally disabled and had reached maximum medical improvement.[54]

First Amendment Issues

A university biology teacher, who was not granted tenure, asserted that tenure was denied in retaliation for his exercise of free speech rights. The teacher made statements that the professors at the university showed favoritism to athletes and pre-med students and that there was an exchange of grades for sex. Although the court found that his remarks related to a matter of public concern, his speech was not a substantial or motivating factor in the decision not to grant tenure.[55]

A maintenance supervisor for a school district was terminated and argued that his termination was in retaliation for his complaints about the alleged misconduct of the basketball coach. The plaintiff had complained about the coach's use of profanity and supposed physical abuse of his players. However, in investigating this matter, plaintiff greatly disrupted the operation of the school by taking students out of class to question them. Furthermore, his work suffered because he spent so much time and energy investigating the coach. Therefore, the Fifth Circuit Court of Appeals found that his speech caused a severe disruption in the operation of the school system and thus, his speech was beyond the protection of the first amendment.[56]

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[51] Trevino v. Board of Trustees, 783 S.W.2d 806 (Tex. Ct. App. 1990).

[52] *See* The Yearbook of Education Law 1990 at 169, Covington v. Beaumont Indep. School Dist., 714 F. Supp. 1402 (E.D. Tex. 1989).

[53] Covington v. Beaumont Indep. School Dist., 738 F. Supp. 1041 (E.D. Tex. 1990).

[54] McGehee v. Broward Community College, 559 So. 2d 368 (Fla. Dist. Ct. App. 1990).

[55] Coats v. Pierre, 890 F.2d 728 (5th Cir. 1989).

MISCELLANEOUS

Taxation

The United States Tax Court determined that the NCAA owed unrelated business income tax on the advertising revenues it received from the programs sold at the Men's Division I Basketball Championship. The appellate court reversed on the basis that the sale of ad space was not a "regularly carried on" business such that the revenue therefrom was taxable as unrelated business income.[57]

The Kansas Supreme Court reversed the Board of Tax Appeals denial of an exemption from sales tax for the NCAA. The state high court concluded that the NCAA was entitled to exemption as an "educational institution."[58]

Public Records

In an Oregon case, a newspaper publisher brought an action under the public records law to have a school district divulge the names and addresses of coaches it hired as replacements during a strike. The replacement coaches had been promised that their personal data would be kept confidential. The Oregon Court of Appeals held that the names of the replacement coaches must be divulged. However, the addresses were submitted in confidence and may reasonably be considered information which is confidential.[59]

The Oregon Supreme Court reversed as it held that both names and addresses were public records which cannot be exempted absent an individualized showing of justification for exemption. Disclosure under

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56. Nieto v. San Perlita Indep. School Dist., 894 F.2d 174 (5th Cir. 1990).
57. National Collegiate Athletic Ass'n v. C.I.R., 914 F.2d 1417 (10th Cir. 1990).
58. National Collegiate Athletic Ass'n v. Kansas Dep't of Revenue, 781 P.2d 726 (Kan. 1989).
59. *See* The Yearbook of Education Law 1990 at 171, Guard Publishing Co. v. Lane County School Dist. No. 4J, 774 P.2d 494 (Or. Ct. App. 1989).

the statute is the norm and a public body may not adopt a policy that seeks to deprive citizens of their right to inspect public records.[60]

Real Estate

The Illinois Legislature conveyed 18.5 acres of lake-bed to a private university to use for the construction of athletic facilities. An injunction was granted to restrain the university from proceeding; the conveyance violated the public trust doctrine since the primary purpose of the grant was to satisfy a private interest.[61]

Bond Issuance

The voters of defendant school district approved a bond proposition of $11 million for the construction of a domed athletic facility at the high school. The plaintiffs sought to enjoin the construction of this facility on the basis that it was not a "school building" under the statute which defined the projects for which bonds could be issued. The appellate court denied the injunction holding that the primary use of the dome was as a school building. The fact that the facility may be extravagant or that nonschool uses of the facility may be contemplated does not alter the fact that the facility is a school building.[62]

First Amendment

A family planning group challenged the rejection of its ads for publication in high school athletic event programs, newspapers, and the yearbook. The Ninth Circuit Court of Appeals affirmed judgment for the school district on the basis that all three publications were nonpublic fora and the ads were reasonably rejected on the ground that they would be controversial and would distract from the educational mission of the high school.[63]

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[60] Guard Publishing Co. v. Lane County School Dist. No. 4J, 791 P.2d 854 (Or. 1990).

[61] Lake Mich. Fed'n v. United States Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990).

[62] Tucson Elec. Power Co. v. Round Valley Unified School Dist. No. 10, 789 P.2d 399 (Ariz. Ct. App. 1990).

[63] Planned Parenthood of So. Nev., Inc. v. Clark County School Dist., 887 F.2d 935 (9th Cir. 1989).

7

FINANCE

Bettye MacPhail-Wilcox and Pat Anthony

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INTRODUCTION

One Supreme Court decision, seven federal appellate decisions, and two district court decisions were published in the area of school finance in 1990. The Supreme Court reviewed a case concerning allegations of school district segregation, along with an ensuing tax assessment issue. The appellate courts handed down decisions involving alleged violations of federal antitrust acts, the supplanting of state and local funds with federal funds, liability insurance payments, payments of costs covered by federal legislation, school district ownership of forfeited property, and alleged violations of the Voting Rights Act. The two district court opinions concerned first amendment establishment clause issues.

One state supreme court ruled on the constitutionality of the state's public school financing scheme, and another state supreme court modified its earlier ruling on the same issue. Several state courts examined the viability of states' revocation of local school aid. Taxpayer challenges to state school district reorganization and use of categorical aid were also heard by the courts. One state court reviewed a case involving the placement of a referendum question on the ballot; the referendum opposed new state school finance legislation.

State courts also litigated cases involving school fees, including those incurred by parents and those levied on developers. Payment of tuition was a source of litigation for parents, a driver and traffic safety instructor, and a student desiring vocational education. There were several cases relating to tax assessment issues, as well as refusal to disburse school tax allocations in their entirety. Cases concerning the use of tax revenues for settlement of liability cases, construction contract disputes, and bidding violations were litigated. Four agencies sued for tax exemptions, while nine state courts reviewed bond issuance challenges. Finally, in the state of Texas, two delinquent tax cases were litigated.

PUBLIC FUNDS for PRIVATE SCHOOLS

Taxpayers sued various school district, state, and federal education officials over implementation of the Education Consolidation and Improvement Act, declaring that monies used to fund remedial programs for students attending sectarian schools violated both the first amendment and the California Constitution.[1] The district court ruled that the targeted school, a public school program for pregnant unwed mothers housed on the premises of a Roman Catholic religious order, was nonsectarian since the program in no way fit a profile previously employed in *Committee for Public Education & Religious Liberty v. Nyquist*[2] to describe a pervasively sectarian institution. The program was not restrictive in its admissions policy. Furthermore, it did not require attendance at religious activities, adherence by students to a particular faith, or inculcation of religious beliefs. It provided no religious instruction, did not restrict faculty appointments to one particular faith, and did not direct faculty on what or how they were to teach.[3] Since the school was nonsectarian, public funding for the program did not violate the establishment clause.

Nor did funding for the program violate article IX, section 8 of the California Constitution, which stipulates, "[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools."[4] Having decided that the unwed mothers' program was a nonsectarian program, the court then determined that although funding for the program was not totally comprised of public funds, the school was controlled by the district and as such did not violate the state constitution.

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[1] Walker v. San Francisco Unified School Dist., 741 F. Supp. 1386 (N.D. Cal. 1990).

[2] 413 U.S. 756 (1973).

[3] 741 F. Supp. 1386, 1392.

[4] *Id.* at 1395.

A third issue the court undertook was determining the constitutionality of federal legislation involving Chapter 2. In holding that it was constitutional, the court pointed out that the primary effect of the legislation was "to provide instructional materials and more effective school programs and to meet the needs of at-risk and high-cost students."[5]

Three final issues had to be resolved. The first concerned the standing of the taxpayers in raising the constitutional challenge. The court agreed with the plaintiffs that, as taxpayers, they did have standing, and then proceeded to the second issue, involving the implementation of Chapter 2 in the district. Again, the court found that Chapter 2 was constitutional in that it provided funding for all students.

Finally, the court disagreed with plaintiffs' assertion that Chapter 2 violated the equal protection clause, observing that the fourteenth amendment applies only to state, not federal, laws and that they lacked standing to challenge Chapter 2 on fifth amendment grounds.[6]

The United States District Court of Massachusetts ordered a consent decree to be entered in a case involving the leasing of a parish center for the use of public school classrooms.[7] In the original case,[8] parents of an elementary school child, citing establishment clause violations, filed suit, seeking reassignment of their son and an injunction to prevent the school district from leasing the parish center. Recognizing the substantiality of the parents' claims, the court ordered the child reassigned for the coming year and developed a timetable for dealing with the constitutional issues of the case. Shortly before the court was to convene a second time, the school district renegotiated its lease with the church. First, citing fiscal reasons, the district agreed not to lease the building for three years. Second, the new lease stipulated that either party could cancel the lease for any reason, having given thirty days' notice. Third, the routes taken by school children in entering and exiting the building were changed so that they would not be exposed to religious articles.

In view of these changes, a consent decree was entered into stipulating that the district was barred from using the parish center for the next three years, and if it later wished to do so it must seek redress in the court at least three months prior to commencement of the lease. The district also was directed to pay part of plaintiffs' attorneys' fees; and both parties were directed to develop a "mutually agreeable program" for students of the district on the meaning of the first amendment's religion clauses.[9]

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[5] *Id.* at 1399.

[6] *Id.* at 1406.

[7] Spacco v. Bridgewater School Dep't, 739 F. Supp. 30 (D. Mass. 1990).

[8] Spacco v. Bridgewater School Dep't, 722 F. Supp. 834 (D. Mass. 1989).

[9] *Id.*

SOURCES and ALLOCATIONS of PUBLIC SCHOOL FUNDS

State School Finance Programs

One state supreme court, New Jersey, issued an opinion concerning the constitutionality of the state's public education financing scheme. A second state, Montana, modified a section of a previous opinion pertaining to the constitutionality of the state education financing system. Two state supreme courts rendered decisions in cases challenging state reductions in local school aid. The New York Court of Appeals considered an issue related to the dispersal of state categorical funds, while the New York Supreme Court, Appellate Division, heard a taxpayers' case challenging a state plan for school district reorganization. Finally, in New Jersey, the state supreme court resolved an issue concerning the right of taxpayers to seek a referendum on the new state school aid act.

In New Jersey, the state supreme court reversed an earlier decision of the Commissioner of Education that the state system for financing schools was unconstitutional, finding instead that "the Act is unconstitutional as applied to poorer urban school districts."[10] The court found the Public School Education Act of 1975[11] to be in violation of the state constitution's "thorough and efficient" clause,[12] because students in certain poorer urban districts were not receiving a thorough and efficient education. In addition, the court determined that newly adopted changes in the law would still not result in achieving a thorough and efficient education for those students.

The court ruled the minimum aid provision of the Act unconstitutional as well, because it was "counter-equalizing," distributing aid to districts which have tax bases in excess of the Act's guaranteed tax base. Since these were the richer districts, the provision increased funding disparities between rich and poor districts, rather than diminishing them. The court concluded that while New Jersey was generous in its spending on education, the manner in which funding was distributed under the current funding law was unconstitutional, because the quality of a child's education was dependent upon the wealth of the district in which the student resided, which was in direct violation of the constitutional clause mandating that all children receive a thorough and efficient education.

In Montana, the state supreme court modified an earlier decision in which the system for financing public education within the state was found to be unconstitutional.[13] The court had retained jurisdiction until July 1, 1989, when the holdings of the court were to become fully effective. Due to the magnitude of the task and the need to pass extensive legislation, a special legislative session was held, bypassing the effective date for implementation of the court's decision. State and school districts petitioned the court to delay the date for implementing the decision, and the court agreed, setting the new date for July 1, 1991. Furthermore, the court declined to retain jurisdiction, observing that the changes in the law would require "new and different proof" from challengers, and such proof would need to be presented in entirely new litigation.

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[10] Abbott by Abbott v. Burke, 575 A.2d 359 (N.J. 1990).

[11] N.J.S.A. 18A:7A-1 to 18A:7A-52, (1975).

[12] N.J. Const. of 1947, art. VIII, sec. 4, para. 1.

[13] Helena Elementary School Dist. 1 v. State, 784 P.2d 412 (Mont. 1990).

The Supreme Court of North Dakota ruled that a state statute allowing the state budget director to reduce local school aid appropriations was not unconstitutional.[14] School districts and the council of school administrators had challenged the authority of the state budget director in reducing the amounts of school aid to local districts during a perceived state fiscal crisis. When the crisis was averted and school aid appropriations were not restored to their original amounts, districts and the administrators sued, maintaining that the budget director was given an illegal delegation of legislative authority .

The court affirmed a lower court decision, upholding the constitutionality of the statute, stating that "delegation of various governmental functions has long been recognized as a virtual necessity."[15] The court also addressed a second issue concerning the statute: once funds were reduced, is the budget director required to restore funds to their original amounts if the funds are available? In interpreting the law, the court found no clear duty on the part of the budget director to restore funds to prior appropriation levels.

In another case concerning the reduction of school aid, the Supreme Judicial Court of Massachusetts ruled that the Governor did not have the authority to reduce state school funds in the face of a state budget shortfall.[16] While acknowledging that the Governor had the power to reduce some state appropriations,[17] the court argued that these particular appropriations were not funds under the control of the Governor or secretary,[18] as stipulated by the statute and, therefore, could not be reduced.

The New York Court of Appeals reversed lower court decisions on the disbursement of categorical funds to administrators who also taught.[19] School administrators challenged a regulation associated with the state's "Excellence in Teaching" program, which precluded teaching administrators from participating in the program. Citing legislative intent, the court maintained that the regulations rationally related to the intent of

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14. North Dakota Council of School Adm'rs v. Sinner, 458 N.W.2d 280 (N.D. 1990)
15. *Id.* at 286.
16. Brookline v. Governor, 553 N.E.2d 1277 (Mass. 1990).
17. Mass. G.L. c. 29, § 9C.
18. *Id.* at 1279.
19. Schneider v. Sobol, 559 N.Y.S.2d 221 (N.Y. 1990).

the program because the purpose of the law was to provide funds to improve salaries for teachers[20] and not to augment salaries of administrators, except for those administrators on a teacher salary schedule.

In another New York case at the Supreme Court, Appellate Division level, taxpayers brought an article 78 proceeding against the Commissioner of Education in order to compel him to revise the state plan for school district reorganization, and to determine which districts were eligible for "high tax aid."[21] The court upheld an earlier decision, ruling first that petitioners must exhaust all available administrative remedies prior to seeking judicial review. The court then determined that neither district seeking high tax aid was eligible according to the state education law, which clearly stated that in order to be eligible, a district must have maintained a K-8 home school and must be continually willing to join efforts toward reorganization.[22] Since neither of the districts fit both of these descriptions, the court ruled that they could not be classified as "high tax aid" districts.

Citizens' groups in New Jersey brought suit to enjoin county boards from putting on the ballot questions concerning the new school aid law.[23] The state supreme court ruled that county boards had no jurisdiction, and enjoined boards from putting the questions on the ballot.

Local Funds for Education

In a case concerning a particular source of local funding for schools in Virginia, the United States Court of Appeals handed down a ruling on alleged violations of the Robinson-Patman Act.[24] Several local photography companies brought suit against two national chains, Olan Mills, Inc. and Kinder-Care, Inc., charging that these two companies engaged in "commercial bribery" when agreeing to pay local high schools a percentage of the profits earned from being the schools' "official photographer" for yearbook portraits. Appellants also charged that the companies developed a "tying arrangement," and conspired with high school officials and each other to restrict access to the trade, thus violating the Sherman Act.[25]

The court, in examining these issues, affirmed a lower court decision for summary judgment in favor of the appellees. First, the court found no evidence of a "tying arrangement," because parents and students were under no obligation to buy yearbooks, the photographs for the yearbooks were free, and there existed no relationship between buying a yearbook and having a yearbook photograph taken. Second, the court found no violation of the Robinson-Patman Act, since the schools were not acting as purchasing agents for the students. Although encouraged to buy portraits from Olan Mills or Kinder-Care, students were under no obligation to do so. In response to two final charges, monopolizing the trade and price-fixing, the court decided that neither claim had been substantiated.

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[20] N.Y. Educ. Law, § 1950[15][a]; § 3602[27][a] (McKinney 1950).

[21] Cario v. Sobol, 557 N.Y.S.2d 592 (App. Div. 1990).

[22] *Id.*

[23] New Jersey State AFL-CIO v. Board of Chosen Freeholders, 579 A.2d 1231 (N.J. 1990).

[24] Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988 (4th Cir. 1990).

[25] *Id.*

Federal Funds for Education

There were two federal appellate decisions concerning the supplanting of state and local school district funds with federal funds. In the first case, the United States Department of Education (DOE) brought suit against the state of Washington and the Spokane School District for allegedly supplanting local and state funds with federal funds which had been provided to the district under the Education of the Handicapped Act.[26] School officials denied the charge, arguing that during the 1980-81 school year, they had incurred an unusually large one-time expenditure ($250,000) by transferring all students who had previously been assigned to self-contained classrooms into the regular program. District officials contended that it was unreasonable for the DOE to insist that the district maintain in the years following 1980-81 the same level of effort of spending as they had that year, since the district's expenses had decreased because they no longer offered self-contained programs, nor were they funding additional transportation to support those programs. The DOE cited section 300.230(b)(1) of the Handicapped Act which outlines two exceptions to the maintenance of effort regulation: (1) when there is a decrease in enrollment of special education students, and (2) when unusually large amounts of funds are expended for such long-term purposes as the acquisition of equipment and the construction of school facilities.[27] In response, the district argued that their number of FTE students had decreased when they placed the students in regular classrooms; and the district had incurred an unusually large one-time expenditure.

The court affirmed the DOE's interpretation of the regulation that the Act required maintenance in funding level except in the two stated instances. The court also agreed with the DOE that in counting handicapped children, the actual number must be used rather than the number of FTE students. The court remanded the case to determine if the one-time large expenditure of the school district merited an exception to the maintenance of effort regulation.

In a similar case, the DOE brought suit against the city and state of New York for violating the Education Consolidation and Improvement Act by using federal funds to replace local and state funding for programs targeted towards educationally disadvantaged students.[28] The United States Secretary of Education ordered New York to repay $20,643,510 to the DOE, having determined that New York had used this amount of chapter 1 funds to offset a budget shortfall. New York education officials maintained that these funds were not used to supplant local and state spending, but to supplement spending, because without the federal dollars, a program for educationally disadvantaged students would have been terminated.

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[26] Washington v. United States Dep't of Educ., 905 F.2d 274 (9th Cir. 1990).
[27] *Id.* at 278.

Citing the wording of chapter 1, that funds should be used to increase the level of support that would be made available from nonfederal sources, the court disagreed with New York officials' interpretation of the regulation, and ruled that federal funds could not be used to supplant local and state funding. The court also determined that an exception to the regulation (i.e., that federal funds were freed to be used for other special educational programs) did not apply in the present case. New York had used the $20 million saved in nonfederal funds to offset a budget shortfall, avoiding budget cuts in programs not aimed at educationally disadvantaged students.

School Fees

During this reporting period, a parent challenged school instructional fees, and developers in several states challenged impact fees. A single Utah parent with six children challenged a school district fee waiver policy which was more restrictive than the policy established by the Utah State Board of Education.[29] The Board's rules provided for fee waivers for children in custody, those in families receiving public assistance, and others who were unable to pay. The school district policy limited the waiver of fees to families receiving public assistance and established partial fee waivers.

In this case, the parent was denied a waiver of $200 in fees for three of her six children. When she appealed to the district, she was found eligible for a partial waiver, whereupon she appealed again and requested a formal hearing. After six months lapsed, she sought a declaratory judgment and injunctive relief, after which the formal hearing was conducted. When the waiver was denied, the plaintiff proceeded to trial, but was denied relief. The court found that the district did not distribute written rules or regulations about qualifying for a fee waiver (it had an unpublished policy providing for partial waivers), that the first appeal hearing was conducted without formal notice and written procedures, and that the district policy conflicted with the intent of state law. The case was reversed and remanded.

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28. New York v. United States Dep't of Educ., 903 F.2d 930 (2d Cir. 1990).
29. Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990).

Several school districts were involved in cases pertaining to residential growth impact fees which were imposed to relieve the burden on school facilities. When a New Hampshire city attempted to impose a growth impact fee on a developer for the funding of a new elementary school, the developer sought to invalidate the fee.[30] Because the city failed to follow procedures for a special assessment in its ordinances, the court granted the motion for summary judgment. In Pittsburgh and California, developers challenged the imposition of residential development fees for school facilities, and lost. The Pittsburgh developer failed to follow the procedural requirements for challenging the fee.[31] The California builder's case was affected negatively by the statute of limitations covering challenges to policy enacting new fee or service charges.[32]

Several other builders in California challenged school impact fees. One builder of a senior citizens' residence challenged the impact fee rate and lost. The Government Code was changed to reduce the rate applied to the construction of senior citizen housing after the builder paid the higher fee under protest. The court held that the school fees were properly collected before the building permit was issued.[33]

Another California developer was awarded attorney fees and granted a *writ of mandate* requiring the school district to vacate a resolution imposing school facilities fees on new commercial and industrial construction.[34] On appeal, the decision was affirmed and the order to award attorney fees was reversed. The district and developer argued that different statutes of limitation governed the time within which an attack of an ordinance or resolution must be filed. The court rejected both, and reviewed the case under a Code of Civil Procedures.

The court held that the school district was required to make certain findings as a precondition to imposing development fees. These findings included a reasonable relationship between the amount of fees to be paid, the needs of the community for elementary or high school facilities, and the need for schools caused by the development. While the district review focused primarily on the justification of fees on residential development, it merely acknowledged the absence of in-depth studies of the impact of commercial and industrial development and assumed a relationship between such development and the overall population. The court held this insufficient, stating that the effects on enrollment would vary widely depending on labor intensity, work force composition, labor recruitment area, and local multiplier effects. The court observed that these factors must be somehow related to square footage, and the commercial fee established must be considered in conjunction with the residential fee.

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[30] Mooney v. City of Laconia, 573 A.2d 447 (N.H. 1990).

[31] North State Development Co. v. Pittsburgh Unified School Dist., 270 Cal. Rptr. 166 (Ct. App. 1990).

[32] Trend Homes v. Central School Dist., 269 Cal. Rptr. 349 (Ct. App. 1990).

[33] RRLH, Inc. v. Saddleback Valley Unified School Dist., 272 Cal. Rptr. 529 (Ct. App. 1990).

[34] Balch Enterprises, Inc. v. New Haven Unified School Dist., 268 Cal. Rptr. 543 (Ct. App. 1990).

Action to invalidate an impact fee on all new construction to build schools was brought against St. Johns County in Florida by an association of builders. The court held that the ordinance violated the constitutional mandate for a uniform system of free public schools, characterizing it as nothing more than a user fee since it was imposed only on those households that had children in the public schools. They certified the issue to the Supreme Court as being one of great public importance.[35]

SCHOOL TAX ISSUES

Cases pertaining to school taxes were numerous and varied. They concerned student tuition, funding of desegregation remedies, property values, the disbursement of tax revenues, school budget provisions, tax exemptions, school bonds, and delinquent taxes.

Tuition

Tuition charges were challenged by driver and safety education instructors, parents of a Down's syndrome child, and a student seeking vocational education. A driver and traffic safety instructor in New York charged that the Commissioner of Education failed to mandate a specific driver and safety curriculum to be offered free of charge to all high school students.[36] Among other things, the plaintiff charged that statutes authorizing school districts to contract with commercial driving schools were unconstitutional and a violation of state law and collective bargaining rights. The motion was dismissed. On appeal, the court affirmed that the instructor did not have standing and that each school district was free to determine if it would offer driver and safety training, whether it would be offered in or outside the regular school schedule, and the charge, if any, to be imposed.

Parents who moved to Massachusetts from one New York town had a Down's Syndrome child who resided in a family home at board in another New York town. During the time the parents lived in state, the school district where they resided reimbursed the school district where the child resided at-board for tuition. When the parents moved to another state, the New York school district in which the child resided notified them that they would have to pay tuition for the child to continue in their schools. The

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[35] St. Johns County v. Northeast Fla. Builders Ass'n, Inc., 559 So. 2d 363 (Fla. Dist. Ct. App. 1990).

[36] Messina v. Sobol, 553 N.Y.S.2d 529 (App. Div. 1990).

Commissioner of Education asserted that because the parents provided financial support and retained the right to revoke their delegation of parental authority, the child was not a resident of the town where he was at-board. The parents brought action and were granted summary judgment.[37] The child was entitled to a tuition free public education in the town where his at-board residence was situated. On appeal, the decision was affirmed. The court held that the Commissioner's decision was, in effect, requiring the nonresident parents to default on the support of their child and relinquish their parental rights. The court did note, however, that mere bodily presence, no matter how long a period, does not satisfy the residency requirement; this condition must be accompanied by a requisite intention to make the locality one's fixed and permanent home. In the present case, the family home at-board was in fact the child's fixed and permanent home. He had lived there since the age of two weeks, and he had never lived with his parents in their home.

Massachusetts statutes authorize regional vocational school districts, preclude member towns from offering the same kinds of vocational education programs, and provide that towns not maintaining vocational schools pay for resident students to attend other vocational schools. When a student was denied admission to the regional vocational school serving his community, he applied to another regional vocational school and was admitted. The Department of Education ordered the student's town to pay the tuition and transportation costs, and the town refused. The student then sought action against the town asserting that he was unlawfully excluded and that his civil rights were violated.[38] The case was transferred to the Supreme Judicial Court which ruled that by not paying the student's tuition and transportation, the town did not unlawfully exclude him from the advantages and privileges of the public schools. The decision was based on the fact that the town maintained a vocational school within the statutory meaning.

Taxation

The United States Supreme Court affirmed in part, reversed in part, and remanded a case which held that the Kansas City, Missouri School District and state of Missouri operated a segregated school district.[39] The district court ordered a detailed desegregation remedy, as well as the financing necessary to implement it. Costs were allocated between governmental entities. However, the court observed that several state statutes would preclude the school district from being able to pay its share. To remedy this, the court enjoined the effect of a statutory provision for a property tax rate roll back contingent upon higher valuation, and later raised the property tax rate from $2.05 to $4.00 per $100 of assessed valuation so that the district could raise the necessary revenue.

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[37] Catlin by Catlin v. Sobol, 553 N.Y.S.2d 501 (App. Div. 1990).

[38] Ciaramitaro v. Superintendent of Schools, 551 N.E.2d 24 (Mass. 1990).

[39] Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

On appeal, most of the decision was affirmed, but the lower court was ordered to divide the cost equally between governmental entities. On remand, the district court directed the state and district to share the cost according to the proportion of fault, which was 75% and 25%, respectively. The division was based on the reasoning that the person who starts the fire has more responsibility for damages than the one who fails to put it out. The court then ordered the district property tax to be increased for the fiscal year 1991-92. On appeal by the state, the decision was affirmed. However, the district court observed that principles of state/federal comity required the use of minimally obtrusive methods to remedy constitutional violations. In future instances, then, the lower court was directed not to set the tax rate but to authorize the district to submit the levy to state tax collection authorities and to enjoin the operation of state tax laws which hindered the school district from funding the remedy adequately. This, the court observed, would minimize disruption of state laws and processes while ensuring maximum consideration of state and local views.

Following a complicated set of procedural petitions and interpretations thereof, the United States Supreme Court reviewed the state's petition. The state argued that the district court remedies were excessive in scope and that the property tax increase violated article III, the tenth amendment, and principles of federal/state comity. The High Court concurred with the state's charge that the imposition of a tax increase by a federal court contravened the principles of comity by intruding upon and circumventing local authority. The Court emphasized that the remedial powers of an equity court must be adequate to the task but not unlimited, and that proper respect for the integrity and function of local government institutions is one of the most important considerations governing the exercise of equitable power. However, the Court then observed that while the district court believed it had no other alternative than to impose the tax, the court of appeals had outlined a proper alternative for future cases. The district court can properly authorize or require a local unit to levy property taxes at a rate adequate for the remedy and enjoin the operation of state laws that would prevent the local entity from exercising this power. Thus, the court of appeals should have reversed the district court on this matter.

The Supreme Court held that arguments pertaining to the scope of the remedy rather than the manner in which it was to be funded fell outside their limited grant of *certiorari* in this case. The remedy rendered by the district court was accepted as proper. The Supreme Court affirmed that the district court properly enjoined state law so that the district could raise requisite tax revenues for satisfying its constitutional obligations.

The modifications ordered by the court of appeals were not invalidated by the tenth amendment, which reserved nondelegated powers to the states. The fourteenth amendment permits a federal court to disestablish local government institutions that interfere with its commands. Furthermore, a court order directing a local government to levy its own taxes is plainly a judicial act within the power of a federal court and is sustained by article III. Local governments with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where the statute operates to hinder federal constitutional guarantees. The case was remanded for proceedings relative to the tax increase imposed by the district court.

Tax Assessment

New Jersey has regional school districts that are funded on the basis of a governmental unit's proportion of total equalized property value. Borough of Sea Bright alleged that this practice was a violation of the tax clause of the New Jersey Constitution and the equal protection clause of the United States Constitution.[40] The Borough argued that proper funding would be based on the percentage of students who were Borough residents. The Superior Court of New Jersey rejected plaintiff's challenges.

An Ohio local board of education sought a review of a property value set by the county tax auditor.[41] As a result the value of the property was increased more than 100%. When the board appealed to the Board of Tax Appeals (BTA), the valuation was increased in excess of another million dollars. On appeal, the court held that the BTA had properly used recent sale price as a measure of true value. Furthermore, the court observed that it would not substitute its judgment for BTA's unless its record indicated that the decision was unreasonable or unlawful.

The superintendent and school board of a Mississippi school district challenged the legitimacy of a leasehold interest in school trust land reserved by the Land Ordinance of 1785.[42] The appeal was taken after a Chancery Court confirmed the title to the holder of the interest. The Mississippi Supreme Court reversed the decision, holding that $7.50 for a ninety-nine year lease was grossly inadequate, and amounted to a donation of public lands prohibited by state constitution and trust law. The court invalidated the lease.

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[40] Borough of Sea Bright v. Department of Educ., 576 A.2d 331 (N.J. Super. Ct. App. Div. 1990).

[41] Board of Educ. v. Board of Revision, 558 N.E.2d 1170 (Ohio 1990).

[42] Hill v. Thompson, 564 So. 2d 1 (Miss. 1989).

Tax Disbursement

A self-insured Colorado school district was granted summary judgment to recover insurance premium taxes for part of a six year period.[43] The Colorado Major Medical Insurance Fund permitted insurance carriers to discount the premiums they received and on which their tax obligation was assessed, but did not extend the same treatment to self-insured businesses. Regulations, passed at a later date, corrected this. When the school district began withholding the adjustment amounts, full remittance was demanded. The school district's recovery of taxes was limited only by its failure to seek judicial review in a timely fashion.[44]

In New York several school districts brought action against town tax officials to recover monetary damages for repeated failures by tax officials to disburse collected tax money in a timely fashion. On appeal, the complaint was dismissed. The court observed that an action for monies is quasi-contractual in nature and that there is no right of recovery under this theory if the money sought has already been paid to the party claiming it, and plaintiffs did not assert any damages which would otherwise be recoverable against the municipal defendants.

In Pennsylvania, the city of Erie had withheld 5% of city income tax collections as a collection fee for over forty years. The Harbor Creek Township School District lodged a protest in 1983 and the Millcreek District joined with Harbor Creek in a multi-count complaint in 1988.[45] The court enjoined Erie from retaining the collection fee as of 1989 and awarded Harbor Creek all collection fees withheld since 1985. Asserting the doctrine of equitable estoppel, waiver, and laches, the court did not return fees to Millcreek and Millcreek appealed.

On appeal, the court agreed that the doctrines of equitable estoppel, waiver, and laches could not be applied in the refusal to award past collection fees since they did not plead them. However, the court observed that the defense of laches was applicable even if not pled, and refused to interfere with the trial court's application of this equitable principle.

Use of School Tax Revenues

Whether an alternative lower budget for the use of school revenues could be placed on a school district's duly filed warning was decided by the Supreme Court of Vermont.[46] Ten percent of a district's voters petitioned to have the warning include a lower budget than that proposed by the school district. The school district declined to include the alternative proposal and taxpayers argued that the legislature did not restrict the proposal of a budget to school boards. The Supreme Court of Vermont affirmed a lower court decision to deny petitioners relief.

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[43] Jefferson County School Dist. v. Division of Labor, 791 P.2d 1217 (Colo. Ct. App. 1990).

[44] Board of Educ. v. Rettaliata, 559 N.Y.S.2d 758 (App. Div. 1990).

[45] Harbor Creek School Dist. v. City of Erie, 579 A.2d 452 (Pa. Commw. Ct. 1990).

[46] Pominville v. Addison Cent. Supervisory Union-Middlebury Union High School Dist. #3, 575 A.2d 196 (Vt. 1990).

After a Missouri school district settled a liability case in which two teachers were awarded costs, attorney fees, and a compromise settlement, the district filed a claim for payment of litigation expenses against a liability insurance policy. The insurer refused payment contending the loss was not covered by the policy. The district sued for reimbursement of costs and settlement of the teachers' suit, damages for vexatious refusal to pay, and attorney fees.[47] After repeated appeals, the court held that the insurer was required to reimburse for sums paid in the settlement of the suit, but not for attorney fees.

When a dispute arose between a contractor retained to build a high school in Massachusetts and a subcontractor, an arbitrator awarded $75,000 to the contractor with most of it going to the subcontractors. The school district petitioned to vacate the award on the grounds that it exceeded the arbitrator's authority.[48] The court vacated the award, defendants appealed, and the decision was reversed. The court observed that, absent fraud, errors of law or fact are not sufficient grounds to set aside an award, and the arbitrator neither granted relief beyond the scope of the arbitration agreement, awarded relief beyond that to which the parties were bound, nor awarded relief prohibited by law.

In a related case in Georgia, the general contractor and subcontractor for construction of a high school filed a demand for arbitration seeking damages in excess of $1 million and attorney fees.[49] They alleged that delays and disruptions, interference with contractual relations, and other costs and expenses should be paid by the Board of Education. The Board sought a stay of arbitration proceedings and lost. The decision was affirmed on appeal.

The Harrisburg Community Unit School District No. 3 in Illinois published a notice of public sale which included a provision reserving the portable classroom to the sellers. They sold the school upon accepting a written offer from a purchaser. The purchaser refused to allow the district to remove the portable classroom. The district filed a complaint which was dismissed; that decision was affirmed on appeal.[50] The court held that the terms in the notice of public sale were not binding on the purchasers since they did not bid on the property at the public sale.

The Clearfield Area School District in Pennsylvania solicited bids for student transportation. After receiving them, the board voted to award the contract to the lowest bidder who met all specifications and bonding requirements. At the following meeting, the Board announced the successful bidder, whereupon an unsuccessful bidder filed for injunction and declaratory action. On appeal, it was determined that the Board had violated the Sunshine Act when it did not conduct a public vote to award the contract.[51]

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[47] New Madrid County Reorganized School Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990).

[48] Plymouth-Carver Regional School Dist. v. J. Farmer & Co., Inc., 553 N.E.2d 1284 (Mass. 1990).

[49] Raymer v. Foster & Cooper, Inc. 393 S.E.2d 49 (Ga. Ct. App. 1990).

[50] Harrisburg Community Unit School Dist. No. 3 v. Steapleton, 553 N.E.2d 76 (Ill. App. Ct. 1990).

A New York paint contractor sought to recover additional wages and supplements he was required to pay employees under minimum wage laws pertaining to public construction projects.[52] Plaintiff argued that the school district was negligent in failing to state the applicable wage law in soliciting bids for the contract. The negligence complaint was dismissed.

A Texas school district sought to recover cost of removing asbestos products from school buildings.[53] It argued that such a right of action was provided by the Comprehensive Environmental Response, Compensation, and Liability Act. In a complicated set of appeals and decisions, the Fifth Circuit United States Court of Appeals held that the district could not recover under this act, but remanded the case in part.

Tax Exemptions

Tax exemption cases during this period concerned an alleged violation of a state constitutional mandate and whether a conservation club, governmental county unit, and legal firm were eligible for property tax exemptions. The North Carolina Constitution provides that property forfeited for violation of state law be used for school purposes. After a local police department received and retained money that was forfeited under federal law, the county Board of Education filed suit to receive the funds and lost. On appeal, the district court decision was affirmed.[54]

After the local police recovered weapons, cocaine, and cash from an in-state-residence, they charged the possessor with violating two provisions of state controlled substance statutes. The Police Department requested that the Drug Enforcement Administration seize the cash administratively. A month later, the Department petitioned for equitable distribution of the cash. The Drug Enforcement Administration initiated administrative forfeiture proceedings, and two months later transferred a portion of the funds to the Police Department.

Between the time that the Police Department filed for an equitable

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[50] Harrisburg Community Unit School Dist. No. 3 v. Steapleton, 553 N.E.2d 76 (Ill. App. Ct. 1990).

[51] Jones v. Clearfield Area School Dist., 578 A.2d 612 (Pa. Commw. Ct. 1990).

[52] Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist., 556 N.E.2d 1087 (N.Y. 1990).

[53] Dayton Indep. School Dist. v. United States Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990).

[54] United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

distribution of the cash and received same, the case was voluntarily dismissed by the state. The district court then ordered the Police Department to return the seized cash to the person arrested. However, the Department never received the order. Later, state charges were reinstated, resulting in an indictment and conviction. The state superior court then ordered the return of cash to the defendant on the grounds that the state prosecutor failed to show that the cash was subject to forfeiture under North Carolina law. The order was neither served nor carried out, and the state prosecutor moved to rescind the order.

The Police Department was ordered to forward the cash to the court to be held pending further proceedings. The Department complied under protest and sought declaratory judgment. The court held that the North Carolina Constitution did not give state courts exclusive jurisdiction over the cash seized. The court of appeals affirmed that only if the state forfeiture proceeding was initiated prior to the federal forfeiture proceeding, and if both procedures were *in rem*, would the state courts have exclusive jurisdiction. The state constitutional provision applies only to forfeitures resulting from breach of state penal law.

Whether a local conservation club was entitled to a property tax exemption was at issue in Michigan.[55] Following fifteen years of exempt status, the property of the Ravenna Conservation Club was placed on the tax rolls. The club appealed its status, asserting that it was an educational institution and a charitable organization. The State Tax Tribunal denied the request, asserting that the club was neither educational nor charitable, whereupon the club appealed.

The Michigan Court of Appeals reversed the State Tax Tribunal, holding that the club was a charitable organization. The court observed that the purposes and activities of this nonprofit organization were to conserve and promote natural resources and wildlife in the state, and that they were intended to benefit the general public without restriction. In addition, the court noted that the club's property was open to the public; its services were available without charge; and club activities lessened an expressly recognized burden of the government.

A religious corporation located in New York failed to pay real estate taxes on its property from 1979 to 1983, at which time the County Treasurer deeded the land to Rockland County. The religious corporation subsequently paid the back taxes, but the County failed to deed the land back to the corporation.

The County began paying taxes levied on the land by the school district in 1986 and subsequently sought reimbursement from the religious corporation. The religious corporation sued for declaratory judgment based on an entitled real property tax exemption. The motion for summary judgment was granted and a refund of school district taxes paid by the county from 1986 to 1988 was ordered. The school district appealed, arguing that when the county acquired the tax deed, it became the legal owner and title holder of the property, thus making the county obligated to pay.[56] The County argued that it did not hold a valid tax deed since the land had been granted tax exempt status by a supreme court declaration. The court held that as legal title holder, the County was responsible for the school taxes during the years at issue.

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[55] Moorland Township v. Ravenna Conservation Club, 455 N.W.2d 331 (Mich. Ct. App. 1990).

A Pennsylvania law firm sought exemption from The Williamsport Area School District Mercantile and Business Privilege Tax, imposed on the gross income of businesses and professions performing services in the jurisdiction.[57] The law firm argued that the practice of law is subject to pervasive regulation by the Pennsylvania Supreme Court, and like liquor and banking industries, it should be exempt from such taxes.

The complaint was dismissed and the decision affirmed on appeal. The court held that the regulatory scheme affecting the legal profession merely monitors the admission, monitoring, and discipline of attorneys' professional and ethical behavior. Such regulation is unlike the regulation of business activity to which bank and liquor industries are subjected.

Bond Issuance

Taxpayers challenged a school bond referendum for nonschool use of facilities, combining multiple capital projects into one referendum, exceeding statutory interest rate ceilings, and failing to give proper notice for capital project funding hearings. In other cases, they questioned school district rights to use fire insurance proceeds to construct a school and to enter into complex lease agreements without voter approval. One school district successfully enjoined a county board of elections from conducting a nonbinding referendum concerning the desirability of the board's decision to construct a school.

Tucson Electric Power Company brought action to enjoin construction of a domed athletic facility at a Round Valley Unified School District high school.[58] On appeal, it argued that the facility was not a school building because nonschool uses were planned for it. The electric company contended also that the bond election was unfair due to information given to the public by the school superintendent and others, that the election ballot did not comply with statutes, and that the trial court should have allowed them to amend their complaint on the day of trial.

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[56] Congregation Zemach David of New Square v. County of Rockland, 558 N.Y.S.2d 702 (App. Div. 1990).

[57] Reiders, Travis, Mussina, Humphrey & Harris v. City of Williamsport, 578 A.2d 618 (Pa. Commw. Ct. 1990).

[58] Tucson Elec. Power Co. v. Round Valley Unified School Dist. No. 10, 789 P.2d 399 (Ariz. Ct. App. 1990).

The court of appeals affirmed the trial court's decision to deny Tucson Electric injunctive relief. The court asserted that the primary use of the domed facility was as a high school athletic facility, and Arizona statutes expressly provide for nonschool use of school buildings. The court observed that it does not determine the wisdom of public expenditures. Furthermore, it rejected plaintiff's contention that it should control the political speech of the superintendent through the imposition of some duty of fairness, and observed that the appropriate remedy for unfair speech is more speech.

In a complicated set of proceedings and appeals, Georgia taxpayers brought action against the Bibb County Board of Education for submitting a single $29 million bond issue to voters rather than four separate bond issues for four categories of school improvements.[59] Plaintiffs argued that combining the projects in one referendum was a violation of state statutes requiring the combined bond issue be submitted to the Attorney General because the change did fall within the meaning of prohibitions contained in the Voting Rights Act and was a violation of their constitutional rights. Plaintiffs contended that the structure of the referendum placed racial restrictions on voting rights since support for parts of the referendum were split along racial lines.

Lower courts found that the structure of the referendum did not fall within the meaning of Voting Rights Act prohibitions. On appeal, the United States Court of Appeals, Eleventh Circuit, held that the form or structure of a referendum was a standard practice or procedure within the meaning of the Voting Rights Act which prohibits racial restrictions on voting rights. The court asserted that the combined referendum had the potential for abridging the right to vote on account of race. The court affirmed the right of minority communities to have a "fully effective vote." The case was remanded to the district court with instructions to determine whether section 2 of the Voting Rights Act had been violated.

Illinois taxpayers challenged a school district's right to issue school bonds for safety improvements at an interest rate exceeding that contained in the School Code.[60] The School Code had an interest rate ceiling of 7%, but the Bond Authorization Act, governing bond indebtedness for any public corporation, had a ceiling of 9% per annum. The circuit court held that the school district was authorized by the Bond Authorization Act to set a rate higher than 7%. The appellate court reversed and the Supreme Court of Illinois reversed and remanded the case.

Montana taxpayers challenged a school district's authority to purchase land and construct a middle school without direct approval of electors.[61]

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[59] Lucas v. Townsend, 908 F.2d 851 (11th Cir. 1990).

[60] Bates v. Board of Educ., 555 N.E.2d 1 (Ill. 1990).

[61] Awareness Group v. Board of Trustees, 795 P.2d 447 (Mont. 1990).

The court dismissed petitions and held that construction of the school with fire insurance proceeds did not require the approval of electors. The decision was affirmed on appeal.

Whether school districts could enter into complex lease agreements without voter approval was at issue in Wisconsin and Florida. Wisconsin taxpayers asserted that a unified school district lacked the power to enter into a lease-purchase agreement for a new high school because it created an indebtedness requiring taxpayer approval. The district contracted to lease the high school because the voters had refused to fund construction of a new school for more than twenty years. The court granted summary judgment to the school district, which was affirmed on appeal.[62]

In Florida, school boards sought judicial validation of a ground lease of school land to not-for-profit entities, a board's leaseback of facilities to be constructed, and trust agreements regarding lease rights.[63] The court validated the obligations, whereupon the state appealed. In affirming this decision, the appellate court stated that because the obligations were not supported by *ad valorem* taxation, referendum approval was not required.

An Indiana taxpayer challenged the adequacy of notice given by a school board proposing to establish a capital projects fund for school construction.[64] The taxpayer was not a resident in the school district where her property was situated. Notice of the proposal hearing was not mailed to nonresident taxpayers, and it was published only once. The school board and state board contended that statutes required only one notice, and there was no duty to notify taxpayers by mail. The Tax Court held that the Capital Projects Fund was a cumulative fund because it was spread over three years and the sources from which the fund was derived were added together to form one fund. In the case of cumulative funds, two notices are required. The case was remanded to the State Board of Tax Commissioners for further action.

A county election board in Pennsylvania sought to conduct a nonbinding referendum question concerning the desirability of Hempfield School District's decision to build a new high school.[65] The school district sought to enjoin the county board of elections from doing so. The district argued that statutes provide school directors with the authority to determine the means for obtaining public review of construction, leasing, or renovating school buildings. The court dismissed the request and, on appeal, the decision was reversed. The commonwealth court held that the election board had no legal authority to place the nonbinding referendum on the primary ballot and that this unlawful action constituted immediate and irreparable harm to the school district.

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[62] Dieck v. Unified School Dist., 458 N.W.2d 565 (Wis. Ct. App. 1990).

[63] State v. School Bd. of Sarasota County, 561 So. 2d 549 (Fla. 1990).

[64] Ackelmire v. North Vermillion Community School Corp., 558 N.E.2d 916 (Ind. Tax Ct. 1990).

[65] Hempfield School Dist. v. Election Bd. of Lancaster County, 574 A.2d 1190 (Pa. Commw. Ct. 1990).

Delinquent Taxes

Two delinquent tax cases were litigated in Texas during this reporting period. A Texas school district brought action against a church for delinquent taxes on property which it owned and used for a private school.[66] The court ruled that the procedure for claiming a tax exempt status violated church rights to free exercise of religion. When the school district appealed, the court ruled that the church ceded its constitutional claim by filing an application for property tax exemption on which it changed the words "application" to "information" and "applicant" to "informant." The church was ordered to pay delinquent taxes on that part of the property which was used for school purposes.

Irving Independent School District in Texas sought to recover unpaid *ad valorem* taxes and penalty obligations arising from same.[67] The Federal Deposit Insurance Corporation, successor for the Federal Savings and Loan Insurance Corporation, brought a motion for summary judgment. The motion was granted, and the court held that the FDIC was not liable for the statutory penalties and interest authorized by the Texas Tax Code.

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66. Birdville Indep. School Dist. v. First Baptist Church, 788 S.W.2d 26 (Tex. Ct. App. 1990).
67. Irving Indep. School Dist. v. Packard Properties, Ltd., 741 F. Supp. 120 (N.D. Tex. 1990).

8

HIGHER EDUCATION

Robert M. Hendrickson*

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INTRODUCTION

In 1990 the case law reflects themes similar to other years. Questions of the authority of federal, state, and local agencies over higher education continues to be one of several dominant issues. Another is the relationship between institutions of higher education and students, alumni, and the public as particularly reflected in the definition of constitutional rights and tort litigation. Employment issues as defined by constitutional and federal and state regulations continue as another dominate theme. Business-university relationships are reflected in the case law on antitrust, copyright, contracts, and patents.

INTERGOVERNMENTAL RELATIONS

This section presents issues concerning the application of taxation, zoning, sunshine, environmental ethics, and jurisdictional laws as the definers of institution-government relationships. Related cases define the scope of authority federal, state, and city governments have over public and private post-secondary institutions. Relationships between federal, state, and municipal authorities are also at issue in litigation presented in this section.

A number of cases challenged the authority or scope of various regulations or policies based on federal constitutional issues. A Minnesota teachers' union and the president of the union as an individual taxpayer challenged a state law allowing high school students to take courses at colleges which applied as credit toward high school graduation at school district expense. At issue is the question of whether the practice of using public money for courses at some private sectarian institutions violated the separation of church and state provisions of the first amendment. The policy called for the payment of the course cost by the school district, and the student had the opportunity to enroll in the college or university of his choice. The district court had granted a summary judgment to the state. On appeal the federal circuit court ruled that the union lacked standing since it was not an organization for the purpose of promoting taxpayer issues. However, the individual as a taxpayer had standing to litigate, and the case was remanded.[1] On remand the district court found the act to be constitutional. The court reviewed the application of the law to eight cases where students attended private sectarian institutions. In seven cases, the court found that the institution was not pervasively sectarian and issued a summary judgment, but in the eighth case, the court denied summary judgment.[2]

In California, a homeowners' association challenged the lease of surplus property owned by a public community college to a religious organization. The court found that the statutes governing the use of public facilities by religious groups did not govern long-term lease arrangements. Furthermore, neither the state constitution nor the Federal Constitution's separation of church and state provisions were violated when the surplus property was leased at fair market value to a religious organization.[3]

A first amendment free speech challenge surrounded federal appropriations legislation which required specific action by the District of Columbia. The appropriations bill required the District to pass a statute allowing religious affiliated institutions to deny benefits or recognition to individuals based on sexual preference. On appeal from a summary judgment, the federal circuit court ruled that the federal appropriations statute did not abridge the free speech rights of District of Columbia council members.[4] Subsequent legal maneuvering involved the tolling of the time to file an appeal for a *writ of certiorari* with the Supreme Court, after an *en banc* hearing on a motion to vacate as moot and other motions.[5]

In a case involving the denial of recognition to a minority alumni association, the court found no discriminatory action by the institution. The court found that the relationship between alumni and the institution was different than that between the institution and students. No first amendment violation had occurred. Denial of official recognition as a separate alumni group did not inhibit the freedom of association rights of these individuals nor was the institutional policy discriminatory.[6]

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[1] Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989).

[2] Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990).

[3] Woodland Hills Homeowners Org. v. Los Angeles Community College Dist., 266 Cal. Rptr. 767 (Dist. Ct. App. 1990).

[4] Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989).

[5] Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990).

The scope of the authority of government units over higher education was at issue in a number of cases. In Nebraska, the issue was the constitutionality of the transfer by legislation of several institutions to the University of Nebraska System. The State Supreme Court acknowledged in its opinion that the legislation was clearly unconstitutional, but it lacked the concurrence of five state supreme court judges, a requisite to declaring legislation unconstitutional in Nebraska.[7] State jurisdiction over organizations was at issue in a Louisiana case.[8] The appellate court affirmed the decision that the state could gain access to a private foundation's financial records. The rationale for access was that the private foundation organized to raise money for a public institution had received public money derived from student fees donated by another private foundation organized to administer moneys received from student mandatory fees. The State Supreme Court reversed this decision finding that the state had the right only to audit public moneys, but did not have the right to review all assets of the private foundation.

Membership in various institutional offices was also at issue. A Kansas court found that provisions which prohibited employees of public educational institutions from serving on the State Board of Education did not violate any of the employees' constitutional rights.[9] A California court ruled on legislation which repealed a statute making the Chief Justice of the State Supreme Court the president of the board of directors of a public law school.[10] The court found that the statute did not interfere with institutional or board autonomy. A Wisconsin obscenity law, which exempted libraries, schools, and contract printers, did not violate either the equal protection clause or the first amendment.[11]

City authority was also challenged in the courts. A New York court ruled that a city had acted in an arbitrary and capricious manner in its decision about proprietary institutions.[12] The city had denied all profit-making institutions the right to participate in the Job Training Partnership Act.

The board of trustee's authority over the institution and its responsibilities were at issue. In New Jersey, a coalition of nurses charged that the state's medical university was prohibited by statute from offering undergraduate degrees.[13] The State Board of Higher Education had authorized the university to offer an associate degree in nursing jointly with a public community college. The court found that statute prohibited the medical university from offering undergraduate degrees on its own, but that it was specifically authorized to offer joint undergraduate degrees in medical related fields. A New York court issued summary judgment to the university in a suit over the adequacy of the faculty in a graduate communications degree program.[14] The institution had documented its compliance with state education law. Finally, access to the personal financial records of the chairmen of the board of trustees of an Alabama university could not be acquired in a suit against the chair in his official capacity.[15]

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[6] Ad Hoc. Comm'n of the Baruch Black and Hispanic Alumni Assoc. v. Bernard M. Baruch College, 569 A.2d 1330 (N.J. 1989).

[7] State *ex rel.* Spire v. Beermann, 455 N.W.2d 749 (Neb. 1990).

[8] State *ex rel.* Guste v. Nicholls College Found., 558 So. 2d 1232 (La. Ct. App. 1990), *rev'd*, State v. Nicholls College Found., 564 So. 2d 682 (La. 1990).

[9] State *ex rel.* Stephan v. Johnson, 795 P.2d 411 (Kan. Ct. App. 1990).

[10] Coutin v. Lucas, 270 Cal. Rptr. 93 (Ct. App. 1990).

[11] Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990).

[12] SCS Business & Technical Inst., Inc. v. Barrois-Paoli, 548 N.Y.S.2d 674 (App. Div. 1989).

Agency authority and prerogative were litigated in the past year. The authority of the United States Labor Department regarding contractors' compliance with federal regulations was at issue.[16] The Secretary of Labor suspended all federal contracts in response to the refusal of three state institutions to complete compliance forms. Each of these institutions was a member of the state university system, but did not directly receive federal contracts. The court ruled that the individual institutions receiving federal contracts, not the state system, would be subject to compliance audits under the provisions of the Vietnam Era Veterans Readjustment Act. A North Dakota landowner's right may have been violated when the Board of University and School Lands foreclosed on his mortgage.[17]

Agency accreditation of institutional programs was also the subject of litigation. The Hair and Beauty Culture Academy brought suit when its accreditation was removed.[18] The court found the charges brought against the institution by the regional accrediting association to be vague. The court also found that the institution was wrongly accused of uncooperative behavior when it asked for clarification of the vague charges.

Sunshine laws and public access to information were again active in the courts. The issues of access to information about university researchers' treatment of animals was before several courts. In one case, the court found that an animal rights group lacked standing in its suit to seek access to files regarding a university's review and approval of a professor's grant.[19] In New York, the court granted access to materials reviewed in approval of grants by the university's animal care and use committee.[20] The court found that research methods and hypotheses were not trade secrets exempt from access, that nonapproved grants were not exempt from access, and that committee members' votes must be recorded and accessible. A Washington court ruled that under the Freedom of Information Act, an animal rights group was not obligated to negotiate with the institution over the release of information before it commenced court action.[21]

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[13] Coalition of Concerned Nurses v. New Jersey Dep't of Higher Educ., 578 A.2d 882 (N.J. Super. Ct. App. Div. 1990).

[14] Fogel v. Teachers College, Columbia Univ., 548 N.Y.S.2d 178 (App. Div. 1989).

[15] *Ex parte* Alabama State Univ., 553 So. 2d 561 (Ala. 1989).

[16] Board of Governors of Univ. of N.C. v. United States Dep't of Labor, 722 F. Supp. 1301 (E.D.N.C. 1989).

[17] Lang v. Bank of N.D., 453 N.W.2d 118 (N.D. 1990).

[18] Wilfred Academy of Hair and Beauty Culture, Houston, Tex. v. Southern Assoc. of Colleges and Schools, 738 F. Supp. 200 (S.D. Tex. 1990).

[19] People for the Ethical Treatment of Animals v. Institutional Animal Care and Use, 794 P.2d 1224 (Or. Ct. App. 1990).

On other sunshine issues, a West Virginia court ruled that a private corporation created to raise money for a public university was not a "public body" accessible under the state's Freedom of Information Act.[22] The Pennsylvania State University was ruled to be a state-related institution, not a public institution, and therefore was ruled to be outside the purview of the state's sunshine law.[23] A New York court granted access to teaching materials under the state's Freedom of Information Act.[24] A private citizen had sued to gain access to materials used in a family life and human sexuality course offered at a community college. Finally, a suit over access to the financial records of an Oklahoma public college was rendered moot since the state attorney general no longer possessed the record.[25]

Taxation authority of political entities over college and university organizations was before the court in a number of states. In Pennsylvania, a court ruled that for taxation purposes, The Pennsylvania State University was a public institution exempt from taxation.[26] At issue was whether University property leased to banks for automatic bank tellers should be subject to local taxation. The court noted and dismissed any problems of inconsistency with a ruling on sunshine laws which found the institution to be a private institution for purposes of information access. In Minnesota, the court found that a private housing corporation, which constructed housing for students and faculty, was not tax exempt.[27] The court found that the organization was not purely a charitable organization. An Ohio court ruled that land owned by the state but leased to a private party was tax exempt because the retail receipts went into the public university's general operating fund.[28] Finally, a California court reviewed the tax exempt status of a university faculty housing project.[29] In order to provide low cost housing, the university leased property on a long-term basis to university employees upon which homes owned by the faculty member were constructed. The lower court ruled that owner leasers could claim a property tax exemption. On appeal the court remanded for consideration of several county objections which were ruled to have merit.

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[20] ASPCA v. Board of Trustees of State Univ. of N.Y. at Stony Brook, 556 N.Y.S.2d 447 (Sup. Ct. 1990).

[21] Progressive Animal Welfare Soc'y v. University of Wash., 790 P.2d 604 (Wash. 1990).

[22] 4-H Road Community Ass'n v. West Virginia Univ. Found., Inc., 388 S.E.2d 308 (W. Va. 1989).

[23] Roy v. Pennsylvania State Univ., 568 A.2d 751 (Pa. Commw. Ct. 1990).

[24] Russo v. Nassau Community College, 554 N.Y.S.2d 774 (Sup. Ct. 1990).

[25] Saxon v. Macy, 795 P.2d 101 (Okla. 1990).

[26] County of Centre, Bd. of Assessment Appeals v. Pennsylvania State Univ., 565 A.2d 187 (Pa. Commw. Ct. 1989).

[27] Chateau Community Housing Ass'n, Inc. v. County of Hennepin, 452 N.W.2d 240 (Minn. 1990).

[28] State Univ. of Cincinnati v. Limbach, 553 N.E.2d 1056 (Ohio 1990).

Active litigation of zoning issues was pursued in a number of local courts. A court denied a municipality's request for an injunction to prevent the use of a remodeled building by a college until the institution complied with municipal site development requirements.[30] The definition of a "family unit" was before the court in a case involving nine male students and a house within the borough that was owned by several of the students and rented to others.[31] The borough had a law allowing the occupation of a living unit by more then one person where a family unit existed. The court found that the students met the zoning law's functional definition of a family unit when they had a common checking account and shared cooking, yard-work, and cleaning duties within the dwelling. A District of Columbia zoning board's procedure of deleting (without explanation) provisions of a development plan which defined the leasing of interim space downtown prior to the completion of a campus building project required the reversal and remand of the board's order.[32] A Massachusetts court found that local zoning and construction ordinances did not apply to a state college dormitory.[33]

Land use was before the court in Illinois.[34] The state, which held submerged Lake Michigan land in public trust, granted Loyola University (a private institution) the use of the land to construct a landfill into the lake upon which to expand its campus. This suit was an attempt to block the project which had received approval from all appropriate federal and state agencies. The federal district court ruled that land held by the state was in public trust for the purposes of navigation, commerce, and fishing free from private interference. Such a trust cannot be abdicated by deeding the land over to a private entity. The plaintiffs requested a rehearing based on the existence of a landfill at Northwestern University, a few miles up the Lake Michigan shoreline. The court noted that the construction of the Northwestern landfill was never challenged in court, and that "the law does not permit one entity to violate the law because another has successfully evaded the same law on another occasion."[35] In another case, the court found that the general land office of the state lacked the power to grant a permit to prospect for minerals on public university and school owned property.[36]

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[29] Connolly v. County of Orange, 272 Cal. Rptr. 186 (Ct. App. 1990).
[30] Village of Cazenovia v. Cazenovia College, 557 N.Y.S.2d 557 (App. Ct. 1990).
[31] Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990).
[32] Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739 (D.C. 1990).
[33] Inspector of Bldgs. of Salem v. Salem State College, 546 N.E.2d 388 (Mass. App. Ct. 1989).
[34] Lake Mich. Fed'n v. United States Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990).
[35] *Id.* at 449.

Jurisdictional questions involved police powers and court orders. In one case, the court ruled that an individual could not be ordered to contribute to an institution's athletic scholarship fund after being convicted of *DUI* and manslaughter.[37] A Virginia court found that a campus police officer did not have authority off campus to arrest an individual suspected of burglary but, as a private citizen, could make a citizen's arrest.[38] In Georgia, the court ruled that the jurisdiction of campus police ended at the statutorily defined 500 yards beyond the campus.[39] A search warrant for student premises more than 500 yards from the campus boundaries was invalid. Tenants who argued that the property owner's removal of ten rental units was a violation of the municipal rent control ordinance were unsuccessful in showing harm to persons the rent control law was designed to protect.[40]

In a case involving ownership, a former property owner lacked standing as an aggrieved party to appeal a zoning board's decision after condemnation proceedings had been finalized.[41] The university was now the owner of the land.

Several cases involved university operated hospitals. The Secretary of Health, Education, and Welfare offset payments for indigent medical care because some funds were used for educational purposes.[42] The physicians had agreed to place a ceiling on income for these services and to place additional money over the ceiling in the academic department's research and education program account as a gift. The court found that the record did not support the Secretary's decision to offset the hospital's payment by the amount allocated to the research and education account and affirmed the lower court's summary judgment in favor of the university. Pennsylvania was found to have failed to have complied with the federal statutory state reimbursement for a university hospital's indigent care.[43] The state had not based its reimbursement scheme on empirical data, such as efficient and economical hospital operations and care costs, as mandated by the federal statute. The state was ordered to bring its reimbursement scheme into compliance with federal law.

In a dispute between a union representing interns, residents, and fellows in health care facilities and the state commissioner of health, the court found

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36. State v. Hollingsworth, 784 S.W.2d 461 (Tex. Ct. App. 1989).
37. Eloshway v. State, 553 So. 2d 1258 (Fla. Dist. Ct. App. 1989).
38. Hall v. Commonwealth, 389 S.E.2d 921 (Va. Ct. App. 1990).
39. Hill v. State, 387 S.E.2d 582 (Ga. Ct. App. 1989).
40. Valentine v. Rent Control Bd. of Cambridge, 557 N.E.2d 63 (Mass. App. Ct. 1990).
41. Brown v. Board of Zoning Adjustment of Kan. City, 782 S.W.2d 655 (Mo. Ct. App. 1989).
42. Loyola Univ. of Chicago v. Bowen, 905 F.2d 1061 (7th Cir. 1990).
43. Temple Univ. v. White, 729 F. Supp. 1093 (E.D. Pa. 1990).

that the commissioner did not exceed his authority in setting limits to the hours health care workers could work.[44] The commissioner set the worker hour limit of 100 hours per week for interns, residents, and fellows of health care facilities.

DISCRIMINATION in EMPLOYMENT

The enforcement of various federal statutes continues to be the dominant issue in this section. Among the factors associated with an increase in litigation regarding age discrimination are the passage of the Civil Rights Restoration Act and changes in university policies regarding retirement age. Proof strategies and jurisdictional questions dominate the litigation of federal discrimination statutes. Faculty title VII litigation on promotion, tenure, and the award of benefits are presented in the faculty section.

Title VI

Questions of the enforcement of title VI of the Civil Rights Act of 1964 were before the courts again this year. One such case involved a 1972 court order which resulted in mandated enforcement of title VI by the Department of Education and disestablishment of dual systems of higher education in seventeen states.[45] In 1984, in a question of the extension of a consent decree, the government raised issues of standing and separation of powers.[46] On remand the original judge vacated the court order on standing and article III issues.[47] On appeal the circuit court found that the plaintiffs had standing, but delayed the separation of powers issue until the next term.[48] In the following term, the circuit court decided that Congress, while intending a private right of action, never intended to establish a "broad gauge" private right of action involved in a suit against a federal agency.[49] The court was quick to point out that Congress had the authority to establish such a private right of action but had failed to do so in this legislation. This decision ended twenty years of court monitored desegregation of seventeen state systems of higher education.

The battle ground for the desegregation of dual systems of higher education was now focused on state litigation. In Mississippi, the district court had ruled that the state's higher education policies fostered an effort to disestablish the state's dual system of higher education.[50] On appeal the circuit court found continuing inequities in the allocation of resources and facilities, the quality and training of faculty, and the quality of programs between the state's predominantly white and black institutions.[51] The court reversed the lower court decision because these inequities maintained racially identifiable public institutions within the state in violation of title VI.

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[44] Hospital Ass'n of N.Y. State v. Axelrod, 546 N.Y.S.2d 531 (Sup. Ct. 1989).

[45] *See* The Yearbook of Education Law 1990 at 203, Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), *modified*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd and modified*, 480 F.2d 1159 (D.C. Cir. 1973).

[46] Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984).

[47] *See* The Yearbook of Education Law 1988 at 229, Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987).

[48] *See* The Yearbook of Education Law 1990 at 203, Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989).

[49] Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990).

A California case involving discrimination in federally funded programs continued to require a decision on the merits. In 1989 the circuit court reversed a district court order to dismiss the case, remanding for adjudication of the title VI claim.[52] The district court wrote the court stating that the plaintiff had failed prior to dismissal to amend the case to include the title VI complaint. However, the circuit court ordered the case remanded, and the appellee was given the right to include the title VI claim.[53]

Civil Rights Claims

Successful plaintiffs in a 42 U.S.C. section 1988 claim raised a question about the hourly rate of attorney's fees.[54] The court found that the special master had not erred in the establishment of the fee rate. Furthermore, while acknowledging the need for highly specialized attorneys in complex civil rights claims, the post-judgment adjudication did not require fee enhancement.

Title VII

Procedural issues were before the courts in several cases. For example, a chapter 7 debtor who had a cause of action pending under title VII, failed to list that action in her chapter 7 petition.[55] The court found that bankruptcy law requires that the chapter 7 trustee, not the plaintiff, has standing in this claim where the plaintiff failed to list the action as an equitable interest or property in her petition. A federal district court ruled that a Montana plaintiff's title VII claim was not barred by eleventh amendment immunity.[56] A federal court reached a similar result for a New

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[50] *See* The Yearbook of Education Law 1989 at 205, Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).

[51] Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990).

[52] *See* The Yearbook of Education Law 1990 at 235, Radcliff v. Landau, 883 F.2d 1481 (9th Cir. 1989).

[53] Radcliff v. Landau, 892 F.2d 51 (9th Cir. 1989).

[54] Martin v. University of S. Ala., 911 F.2d 604 (11th Cir.1990).

[55] Harris v. St. Louis Univ., 114 B.R. 647 (E.D. Mo. 1990).

[56] Black v. Goodman, 736 F. Supp. 1042 (D. Mont. 1990).

York plaintiff.[57] The last procedural case involved a finding that genuine issues of material fact, as to the racial animus of the employer's termination action and the plaintiff's charge of retaliation, precluded the defendant's motion for summary judgment.[58]

Proof strategy in title VII litigation was also at issue. An instructor brought charges of discrimination in the denial of her promotion to an assistant professor.[59] The instructor was successful in establishing a *prima facia* case of discrimination. The defendant institution provided a valid nondiscriminatory reason, the instructor's failure to become involved in professional activities in her area of teaching, as the basis of its employment decision. The plaintiff failed in her burden to prove that the reason was a pretext for discrimination.

A class action suit involved a disparate treatment analysis at a Texas institution of higher education.[60] The federal circuit court had remanded the case for litigation of a professional employee's class action claim of discrimination.[61] The court, on remand, found that the institution had failed to provide valid reasons for the lack of uniform criteria for employment classifications, titles, pay, promotions, and other employment policies prior to 1977. Back pay and other equitable relief were awarded to the class of employees.

Damage awards were also litigated by the courts. The Fifth Circuit Court of Appeals, in a case previously adjudicated on the merits,[62] refused to award front pay as damages.[63] The court found that the plaintiff had failed to seek equivalent employment with "reasonable diligence" after termination of her community college position.

Age Discrimination in Employment Act

Procedural issues lead off the discussion of age discrimination cases. A West Virginia faculty claimed age discrimination because The Full Time Faculty Salary Act would allegedly favor young faculty.[64] The court found that legislative immunity barred the litigation. Tolling was before a federal district court which ruled that Puerto Rico was a "deferral" state making the tolling period 300 days in age discrimination actions.[65] A summary judgment award was reversed by the federal appeals court because the facts raised questions about the effect gender had in a hiring decision and defendant's response to plaintiff's interrogatories should have been weighed in the summary judgment decision.[66] A summary judgment for an institution was upheld because the court found a retired employee, who was applying for his previously held position, had no property right in acquiring that position.[67] A federal district court refused jurisdiction over pendent state claims because the comprehensive nature of the state age discrimination law would have a dominating effect over the federal age discrimination claim.[68]

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[57] Derechin v. State Univ. of N.Y., 731 F.2d 1160 (W.D.N.Y. 1990).

[58] Cassells v. University Hosp. at Stony Brook, 740 F. Supp. 143 (E.D.N.Y. 1990).

[59] Board of Regents for Regency Univs. v. Human Rights Comm'n, 552 N.E.2d 1373 (Ill. App. Ct. 1990).

[60] Wilkins v. University of Houston, 725 F. Supp. 331 (S.D. Tex. 1989).

[61] *See* The Yearbook of School Law 1983 at 298, Wilkins v. University of Houston, 662 F.2d 1156 (5th Cir. 1981).

[62] *See* The Yearbook of School Law 1989 at 208, Sellers v. Delgado College, 839 F.2d 1132 (5th Cir. 1988).

[63] Sellers v. Delgado College, 902 F.2d 1189 (5th Cir. 1990).

[64] Nuchims v. West Virginia, 724 F. Supp. 1219 (S.D.W. Va. 1989).

[65] Astacio-Sanchez v. Fundacion Educativa Ana G. Mendez, 724 F. Supp. 11 (D.P.R. 1989).

The proof strategies in age discrimination cases were illuminated in a Kansas case.[69] The unsuccessful applicant for a position established a *prima facia* case for discrimination. The university had articulated valid nondiscriminatory reasons for the employment decision, but the trial court had erred in applying a "burden to persuade the court"[70] of the genuine validity of the reasons to the employer. The plaintiff failed to show that the reasons were a pretext for discrimination.

Age discrimination in employee benefits centered on an institution's early retirement program.[71] The plan allegedly penalized those who chose not to retire early because of the differential way sick pay and insurance benefits were structured for early retirees. The court found that the plan was not facially discriminatory, and the tolling period for this litigation had long since passed.

Retaliation was at issue in an Illinois case.[72] Based on a collective bargaining agreement, the institutional grievance procedures were suspended when the plaintiff pursued an age discrimination claim. The court found that the institution and the union had no intent to retaliate in adopting this procedure. Their intention of saving time, effort, and money by eliminating simultaneous litigation on the same issue was valid.

Insurance coverage when an institution is in violation of the age discrimination act was at issue in Massachusetts.[73] The federal circuit court of appeals ruled that reckless disregard for federal regulations was deliberate wrongdoing, negating the indemnification requirement of the insurance company under the state's public policy. The case was certified to the state supreme court.

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[66] Burns v. Gadsden State Community College, 908 F.2d 1512 (11th Cir. 1990).
[67] Evans v. Pugh, 902 F.2d 689 (8th Cir. 1990).
[68] Linares v. University of P.R., Rio Piedras Campus, 722 F. Supp. 910 (D.P.R. 1989).
[69] Kansas State Univ. v. Kansas Comm'n on Civil Rights, 796 P.2d 1046 (Kan. Ct. App. 1990).
[70] *Id.* at 1054.
[71] EEOC v. City Colleges of Chicago, 740 F. Supp. 508 (N.D. Ill. 1990).
[72] EEOC v. Board of Governors of State Colleges and Univs., 735 F. Supp. 888 (N.D. Ill. 1990).
[73] Andover Newton Theological School v. Continental Casualty Co., 901 F.2d 1 (1st Cir. 1990).

The Rehabilitation Act

The scope of the Rehabilitation Act was involved in a case over hiring practices litigated prior to the enactment of the Civil Rights Restoration Act.[74] The Tenth Circuit Court of Appeals ruled that the expansion of the scope of the Rehabilitation Act to the whole institution by the Civil Rights Restoration Act was not retroactive. The security company, which refused to hire a one-eyed applicant as a security guard relying on Department of Energy hiring regulations, was a procurement contractor.[75] The court found that the Department's regulations which excluded procurement contractors from the definition of a program or activity receiving federal financial assistance under the Act were appropriate.

Procedural questions before the court involved issues similar to other federal acts reviewed. A New York handicapped plaintiff's claim against a state agency was barred by eleventh amendment immunity, but claims against state officials in their individual capacity could be litigated.[76] The court also found that a former student could sustain a claim over money paid by the office of vocational rehabilitation while he was a law student. The plaintiff challenged caps placed on the money he could receive during his law school education. In a case involving the failure of the institution to help the handicapped plaintiff move to a new location, the time to file a claim had lapsed.[77] In a Pennsylvania case, the court ruled that no form of reasonable accommodation could compensate for excessive absenteeism and that "being absent" did not qualify as a handicap under federal law.[78]

The interpretation of the Department of Education's regulations on the provision of auxiliary aid to handicapped individuals by universities was litigated.[79] The Eleventh Circuit Court of Appeals ruled that the Department was correct in ruling that an Alabama university could not base the award of auxiliary aid to handicapped individuals on financial need. Furthermore, the institution could not deny auxiliary aid to nondegree students enrolled in noncredit programs. Finally, the court found that the institution's transportation accommodations for handicapped individuals, which operated for only four hours a day, were inadequate under the regulations.

Hiring Discrimination

An Illinois court found that the university had failed to seek appropriate administrative remedies before pursuing the matter in court.[80] The court rejected the university's argument that the next step in the administrative remedy scheme, an appeal to the full commission, was futile.

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[74] The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a.

[75] DeVarqas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990).

[76] McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990).

[77] Eastman v. Virginia Polytechnic Inst. and State Univ., 732 F. Supp. 665 (W.D. Va. 1990).

[78] Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990).

[79] United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).

FACULTY EMPLOYMENT

Faculty litigation continues to be extensive. Nontenured faculty raised questions surrounding nonrenewal, tenure review, and denial of tenure. Tenured faculty raised questions surrounding termination and denial of other faculty benefits. Allegations of violations of first amendment rights lead off both sections on faculty.

First Amendment Rights

A university professor filed suit after the institution ordered him not to discuss religious beliefs in the classroom or to hold out-of-class group discussions about the Christian perspective on scholarly topics.[81] The institution claimed [illegible] duty under the provisions of the state and federal constitutions' establish[illegible]nt clauses to restrict pronouncements about religion. The court, noting [illegible]hat the plaintiff always prefaced his comments as "personal bias," relied on the concepts of academic freedom. The court stated that:

> [t]he University has created a forum for students and their professors to engage in a free exchange of ideas. It may not exclude disfavored religious speech unless the exclusion is necessary to further a compelling governmental interest and narrowly tailored to further that interest.[82]

The court held that the university's placement of a restriction on expressions of personal religious views was too broad and vague to establish a compelling state interest. Furthermore, out of class meetings cannot be prohibited, just as the use of facilities cannot be prohibited, to religious groups once facilities are opened to public use.

Nontenured Probationary Faculty

The Nonrenewal Decision. A number of faculty litigated issues after their probationary contracts were not renewed. An Alaska faculty member was awarded another one-year contract by the court when the institution failed to meet its deadline for notification that the contract would not be renewed.[83] Amending the regulation during the contract year to a later deadline did not change the institution's notification obligations for that year.

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[80] Board of Trustees of S. Ill. Univ. v. Illinois Human Rights Comm'n, 553 N.E.2d 1108 (Ill. App. Ct. 1990).

[81] Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990).

[82] *Id.* at 1566.

Questions of *de facto* tenure because of failure of an institutions' notification or review procedures were at issue in several cases. The Sixth Circuit Court ruled that a Kentucky public institution's policy and state statute clearly prevented the award of *de facto* tenure.[84] The authority to award tenure was delegated by statute to the Board of Regents through a recommendation from the institution's president. The award of one-year contracts beyond the probationary period resulting from previous litigation did not warrant a finding of *de facto* tenure where statutory authority is clear and a termination order had been issued.

A breach of contract claim was brought by a private college faculty member.[85] A New York court ruled that the denial of reappointment was not a breach of contract spelled out in either the contract or the faculty handbook. However, a North Dakota court found that the institution had violated its employee policies when it failed for seven months to supply reasons for the nonrenewal decision. The policy required a response within seven days after a written request.[86] The case was remanded to determine institutional liability and an appropriate damage was awarded.

Two community college instructors were successful in claiming violations of due process when they were terminated during the contract period.[87] The court found that an Alabama law entitled the Fair Dismissal Act[88] guaranteed these employees a hearing even when their contract had expired and was not renewed.

Denial of Tenure. A state court ruled that the institution had failed to follow its procedures during the tenure review of a probationary faculty member.[89] However, the court found that the appellate decision erroneously ordered the award of tenure and the rank of associate professor and then remanded the case for the Board of Trustees to determine whether tenure should be awarded.

The Second Circuit Court of Appeals ruled that an assistant professor at a New York public university lacked a property right in the renewal of his probationary contract and, therefore, could not claim due process rights.[90] The plaintiff, a black faculty member, also failed to substantiate a first amendment freedom of speech claim as the sole reason for the nonrenewal decision. Embroiled in this case was a course taught by the plaintiff in the African American Studies Department in which the plaintiff used Naziism, Apartheid, and Zionism as "the three main forms of racism." An Indiana faculty member also failed in a claim of a property right in the promotion and tenure decision.[91]

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[83] Zuelsdorf v. University of Alaska, Fairbanks, 794 P.2d 932 (Alaska 1990).
[84] Edinger v. Board of Regents of Morehead State Univ., 906 F.2d 1136 (6th Cir. 1990).
[85] De Simone v. Skidmore College, 553 N.Y.S.2d 240 (App. Div. 1990).
[86] Hom v. State, 459 N.W.2d 823 (N.D. 1990).
[87] Clayton v. Board of School Comm'rs of Mobile County, 552 So. 2d 155 (Ala. Civ. App. 1989).
[88] Alabama Code 1975 36-26-100 *et seq.*
[89] Board of Trustees of Univ. of Ky. v. Hayse, 782 S.W.2d 609 (Ky. 1989).
[90] Dube v. The State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990).

Access to review materials used in the tenure review process was before the court. In one case, a faculty member was unable to establish defamation or the falsity of a committee member's report of a phone conversation with an external reviewer.[92] The outside reviewer had recanted over the phone some of the positive things he had said in his letter supporting the plaintiff's candidacy for tenure.

Allegations of Civil Rights Violations in Tenure Denial. First amendment rights of probationary faculty have resulted in claims that probationary faculty were denied tenure or notified of nonrenewal because of protected speech. In a Massachusetts case, the court simply refused an institution's motion to dismiss the plaintiff's claim that denial of tenure was due to first amendment protected speech.[93] A biology professor's speech on grading and the inappropriate behavior of departmental faculty was protected speech involving matters of public concern, but the speech was not the reason for the denial of tenure. Tenure was denied because of failure to meet class, inadequate scholarship, and threats made to his wife in front of a class she was teaching. Indiana faculty, who were denied promotion and tenure, were unable to show that comments about a personnel committee internal to the sociology department were matters of public concern implicating first amendment protection.[94]

Title VII. Cases involving employment discrimination in the denial of tenure or nonrenewal decision were brought under various federal statutes covering discrimination. For example, a white law professor at a predominantly black public institution charged racial discrimination in a tenure denial decision.[95] On appeal the Fifth Circuit found that a jury could reasonably reach a verdict that the failure to grant tenure was for discriminatory purposes. The Eighth Circuit reversed and remanded a lower court decision finding that a clinical instructor was terminated for valid job performance reasons.[96] The clinical nursing instructor who had caused the loss of two clinical contracts with hospitals was not similarly situated with another clinical instructor who had positive reviews from the clinical settings where she supervised students. On remand, the lower court must decide whether the institution intended to discriminate against the instructor.

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[91] Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268 (S.D. Ind. 1990).
[92] Gautschi v. Maisel, 565 A.2d 1009 (Me. 1989).
[93] Karetnikova v. Trustees of Emerson College, 725 F. Supp. 73 (D. Mass. 1989).
[94] Coats v. Pierre, 890 F.2d 728 (5th Cir. 1989).
[95] Arenson v. Southern Univ. Law Center, 911 F.2d 1124 (5th Cir. 1990).
[96] Hayes v. Invesco, Inc., 907 F.2d 853 (8th Cir. 1990).

A female probationary faculty member was unsuccessful in showing that sexual harassment was gender discrimination which served as the basis for a nonrenewal decision.[97] The Seventh Circuit affirmed the lower court decision that sexual harassment based on sexual desires was not harassment based on gender discrimination.

A district court found that a female faculty member was denied tenure for reason of gender discrimination in violation of title VII.[98] On appeal, the First Circuit ruled that the testimony of a professor comparing those who had been granted tenure with the plaintiff was admissible evidence.[99] The court also ruled that the court had jurisdiction over pendent state contract claims and that the award of tenure was a reasonable remedy in title VII cases. Another title VII case emanating from an earlier decision on procedural issues was litigated on the merits.[100] The district court found that the plaintiff, a female faculty member denied tenure, had established a *prima facia* case for tenure and that the institution had provided nondiscriminatory reasons for the decision. Furthermore, the plaintiff had failed to show pretext.[101] In this case where some reasons for the decision had the potential of being based on sex discrimination, the court had to determine whether the same outcome would have been achieved without the gender based reasons. On appeal, the First Circuit affirmed the lower court decision and found that statements made by the dean of the school regarding the need for gender quotas to increase the number of women faculty and the selection of a person the plaintiff objected to on the tenure review subcommittee did not prove discriminatory animus.[102] The final case in this section dealt with procedural maneuvering to have a title VII claim voluntarily dismissed. However, the plaintiff's refusal to proceed to trial resulted in the dismissal of the case.[103]

Tenured Faculty

Termination for Cause. Tenured faculty terminated for cause have challenged the action. Procedural matters resulted in one ruling. The Seventh Circuit acknowledged its error when it dismissed an appeal because it thought the district court judgment was still pending.[104]

The definition of contract provisions which allow institutions to terminate tenured faculty was at issue. In a breach of contract claim, a Louisiana court found that the plaintiff had been afforded appropriate due process and appeals in the termination of the tenured contract for professional incompetence.[105] An Arizona case raised questions as to whether a faculty member had abandoned his job when he failed to sign a contract over a salary dispute.[106] The faculty member claimed the institution had classified him inaccurately for merit pay. In response to the faculty member's letter indicating his intent to continue employment and explaining his refusal to sign the contract for reasons of discrepancies in merit pay, the president of the institution agreed in writing to place his contract in abeyance until a hearing was held. The hearing was not held, but the faculty member was later given ten days to sign and return the contract or he would abandon his job. A state court, on appeal, affirmed the denial of summary judgment to the institution. The court noted that the state law the institution relied on did not require that the executed contract be returned by a certain date.

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[97] King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990).

[98] *See* The Yearbook of Education Law 1989 at 214, Brown v. Trustees of Boston Univ., 674 F. Supp. 393 (D. Mass. 1987).

[99] Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989).

[100] *See* The Yearbook of School of Law 1987 at 248, Jackson v. Harvard Univ., 111 F.D.R. 472 (D. Mass. 1986).

[101] Jackson v. Harvard Univ., 721 F. Supp. 1397 (D. Mass. 1989).

[102] Jackson v. Harvard Univ., 900 F.2d 464 (1st Cir. 1990).

[103] Zagano v. Fordham Univ., 900 F.2d 12 (2d Cir. 1990).

[104] Patterson v. Crabb, 904 F.2d 1179 (7th Cir. 1990).

A North Dakota faculty member alleged that his termination was arbitrary and capricious.[107] The faculty member claimed that the first time he became aware that a departmental faculty meeting was for the purpose of reviewing his performance and deciding whether he should be terminated was at that meeting. The Eighth Circuit affirmed a district court decision to deny a motion for summary judgment because material issues existed as to the legality of the termination process and the decision. In the termination of a New Jersey faculty member, the court found that the institution's policies did not allow for the termination of a faculty member for a violation of professional ethical standards.[108] The institution in its termination decision could not link the statement on ethical standards, which was not a part of the termination policy, to the legitimate cause as stated in the policy of "failure to maintain standards of scholarship and teaching."[109] The court considered it a "disgrace" that the institution could not follow through with the employment action given the unethical behavior of the defendant.[110] The faculty member had been accused of threatening and exploiting graduate students.

The institution's coverage under a liability insurance policy for litigation costs resulting from the termination of a tenured faculty member was at issue in California.[111] The private university was found to have intentionally discriminated under title VII in the discharge of a professor. The discharge was not consistent with the policy's definition of an "accidental occurrence" resulting in coverage.

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[105] Olivier v. Xavier Univ., 553 So. 2d 1004 (La. Ct. App. 1989).

[106] Bowman v. Board of Regents of Univs. and State Colleges of Ariz., 785 P.2d 71 (Ariz. Ct. App. 1989).

[107] Morris v. Clifford, 903 F.2d 574 (8th Cir. 1990).

[108] San Filippo v. Bongiovanni, 743 F. Supp. 327 (D.N.J. 1990).

[109] *Id.* at 334.

[110] *Id.* at 328.

[111] Loyola Marymount Univ. v. Hartford Accident and Indem. Co., 271 Cal. Rptr. 528 (Ct. App. 1990).

Termination for Financial Exigency. Community college faculty laid off for a financial exigency sued claiming they were denied due process.[112] The Sixth Circuit found that genuine issues necessitated the reversal of the district court's grant of summary judgment to the institution. In another case, a tenured faculty member's position was eliminated when the board approved a reorganization plan.[113] A Colorado court found that the professor lacked standing to challenge the board's plan given the board's authority over books, courses, and instruction.

Denial of Employee Privileges. Denials of promotion to full professor were before several courts. A California faculty member claimed gender discrimination in the denial of her promotion to full professor.[114] The court, noting that the plaintiff and a male colleague were both denied promotion, found that the decision was based on scholarship, service, and teaching. An Hispanic New Jersey faculty member was successful in his claim that he was denied promotion to full professor because of his national origin and in retaliation for a previous title VII claim.[115] In this disparate treatment case under title VII, the plaintiff relied on a comparative analysis of other similarly situated faculty who were promoted. The comparative data were used to show that the institution's reason for denial lacked credence.

The termination of a department chair during the contract period resulted in the reversal of an administrative hearing decision.[116] The court found that a property interest and an implied liberty interest (damage to his reputation) required an administrative hearing in order to meet due process requirements. The court ordered his reinstatement. Finally, a court found that a medical professor had no property interest in a transfer from one department to another which was not preceded by due process.[117]

A faculty member was unable to show that the use of a standardized teacher evaluation form violated her academic freedom because it was inconsistent with her education theory.[118] Underlying this claim was controversy over the award of merit pay. Another faculty member who voluntarily resigned his position was denied unemployment compensation.[119] The state agency had denied unemployment compensation when the resignation was voluntary. Finally, a faculty member who transferred

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112. Johnston-Taylor v. Gannon, 907 F.2d 1577 (6th Cir. 1990).
113. Bennett v. Board of Trustees for Univ. of N. Colo., 782 P.2d 1214 (Colo. Ct. App. 1989).
114. University of S. Cal. v. Superior Ct., 272 Cal. Rptr. 264 (Ct. App. 1990).
115. State *ex. rel.* Guste v. Nicholls College Found., 558 So. 2d 1232 (La. Ct. App. 1990).
116. Spiegel v. University of S. Fla., 555 So. 2d 428 (Fla. Dist. Ct. App. 1989).
117. Farkas v. Ross-Lee, 727 F. Supp. 1098 (W.D. Mich. 1989).
118. Wirsing v. Board of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990).
119. Prescott v. Moorhead State Univ., 457 N.W.2d 270 (Minn. Ct. App. 1990).

to another department without loss of rank or pay was unable to show that a due process right existed or that first amendment rights had been violated.[120]

ADMINISTRATORS and STAFF

Termination of administrators and staff continues to be heavily litigated. Issues include the jurisdiction and procedures of the court, the nature of the contractual obligations, and federal regulations which prohibit discrimination. Of particular importance are the constitutional questions of whether these employees possess a property right or a liberty interest requiring due process, or whether there has been a violation of their first amendment rights.

Questions of the court's jurisdiction or the scope of state laws involved in this type of litigation come into play. For example, a Montana court found that the state's public universities and colleges were not local government entities with legislative authority qualifying for immunity.[121] Plaintiff's wrongful discharge was not barred from litigation. In a case involving a New York plaintiff, the court ruled that limiting redress for employment discrimination to title VII was harmonious with other courts and the basis for dismissing a 1981 claim.[122] Under the Federal Rules of Procedure, a Maryland case was dismissed when the plaintiffs failed to provide a "short and plain statement of . . . [their] claim."[123] A North Carolina court found that the plaintiff, a dismissed research associate, failed to state a viable claim when he alleged that he was dismissed for associating with an unpopular faculty member.[124]

Tolling was at issue in a number of cases. A District of Columbia university hospital employee who had been dismissed for poor work performance, while grieving the dismissal, waited eighteen months to file a discrimination claim under the District of Columbia's Human Rights Act.[125] The court dismissed the claim as time-barred. The tolling period ran out for a plaintiff who failed to file a claim within thirty days after the hearing officer of the state personnel board had mailed his decision.[126] A federal court found that the action of state officials which were alleged to violate the constitutional rights of a dismissed library director did not come under eleventh amendment immunity provisions barring a suit.[127] On a defense motion for a summary judgment based on tolling in the same case, the court found that each of the claims (illegal search, interrogation without council, and issuing a libelous report) were separate, discrete claims and not part of a continuous claim.[128] Defendant's motion was granted.

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[120] Huang v. Board of Governors of the Univ. of N.C., 902 F.2d 1135 (4th Cir. 1990).

[121] Mitchell v. University of Mont., 783 P.2d 1337 (Mont. 1989).

[122] Alexander v. New York Medical College, 721 F. Supp. 587 (S.D.N.Y. 1989).

[123] Anderson v. University of Md. School of Law, 130 F.R.D. 616, 617 (D. Md. 1989).

[124] Privette v. University of N.C. at Chapel Hill, 385 S.E.2d 185 (N.C. Ct. App. 1989).

[125] Jones v. Howard Univ., 574 A.2d 1343 (D.C. App. 1990).

[126] Vendetti v. University S. Colo., 793 P.2d 657 (Colo. Ct. App. 1990).

Property rights and requisite due process were before the courts in several cases. A West Virginia administrator dismissed from his position, on appeal, failed to sustain the premise that he held tenure at the institution as a faculty member.[129] The fact that he taught courses and was given a courtesy title of associate professor did not, under the terms of his appointment, give him tenure and a property right to a termination hearing. A community college administrator claimed a property right in both the administrative position and his previously held faculty position.[130] The district court granted summary judgment in favor of the defendant institution and the federal circuit court affirmed the decision.[131] The Fourth Circuit Court of Appeals found that pre- and post-deprivation procedures met due process requirements as mandated by the employee's property right or employment contract.[132] Furthermore, the court noted that it typically had been reluctant to recognize multiple property interests with the same employer.[133] In Louisiana, an administrator employed as an "at will employee" could not claim wrongful discharge or invoke an alleged contractual right to a grievance procedure.[134] The administrator, dismissed for poor job performance and differences with his superior, had been employed in his present position for thirty years. A Texas court reached a similar result finding that, based on the institution's handbook, an at-will employee was without a property right.[135] In Ohio, a court found that the institution was not obligated to provide a stenographic or taped record of the pretermination hearing.[136]

First amendment claims involving the termination of administrators were also litigated. A summary judgment was denied to an institution in the case of the termination of the "internal grains program" director.[137] Material issues of fact remained as to whether the statements made by the director were the sole or motivating factor for the dismissal decision.

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[127] Detro v. Roemer, 732 F. Supp. 673 (E.D. La. 1990).

[128] Detro v. Roemer, 739 F. Supp. 303 (E.D. La. 1990).

[129] State *ex. rel.* Tuck v. Cole, 386 S.E.2d 835 (W. Va. 1989).

[130] Fields v. Durham, 909 F.2d 94 (4th Cir. 1990).

[131] *See* The Yearbook of Education Law 1989 at 222, Fields v. Durham, 856 F.2d 655 (4th Cir. 1988), *vacated and remanded*, 110 S. Ct. 1313 (1990).

[132] Fields v. Durham, 909 F.2d 94 (4th Cir. 1990).

[133] *Id.* at 98.

[134] Gilbert v. Tulane Univ., 909 F.2d 124 (5th Cir. 1990).

[135] Hicks v. Baylor Univ. Medical Center, 789 S.W.2d 299 (Tex. Ct. App. 1990).

[136] Local 4501, Communications Workers of Am. v. Ohio State Univ., 550 N.E.2d 164 (Ohio 1990).

[137] Konijnendijk v. Deyoe, 727 F. Supp. 1392 (D. Kan. 1989).

Additionally, the court found that statements made in his official capacity were not exempt from first amendment protection. In another reassignment case, the dean's comments about the fiscal management of the institution were matters of public concern and, therefore, protected speech.[138] Furthermore, the institution had not established that speech was the motivating factor for its employment decision. However, on a motion to reconsider, the court granted defendant summary judgment finding that statements on fiscal management were made after the meeting to reassign was called.[139] Finally, an institution found itself in court over the termination of an administrator's grievance proceedings on alleged sex and race discrimination after she wrote to her senator seeking redress. The institution's grievance manual requirement for the maintenance of exclusivity and confidentiality during the grievance procedure did not violate the plaintiff's first amendment rights when it served as the basis for the termination of the grievance process.[140]

Discrimination was also at issue in the termination of administrators and staff. A Minnesota court upheld an administrative law judge's determination that a female grounds keeper had been discriminated against when she was terminated.[141] The court also affirmed the award of punitive damages finding the institution had fabricated student testimony and covered up sex discrimination. In another case, the court found that only the university president had the authority to approve a contract, and that he had failed to do so.[142]

The terms and conditions of the employment contract are an important aspect of administrator and staff terminations. A Pennsylvania court found that the renewal of a contract at the beginning of the fiscal year, even after informing the employee she should look for other employment, constituted an oral one year contract.[143] In another case, summary judgment was denied to an institution because the court found that an implied contract may have existed between the school and a basketball coach.[144] Origins for the possible implied contract came from longevity of service and communications which reflected assurance of continued employment. These factors created a reasonable expectation that the coach would be terminated only for cause.[145] An Oklahoma court found that the contract may have been breached if the employee's dismissal was the result of his violating the chain of command by going over his supervisor's head to report illegal disposition of state property.[146] An Illinois court affirmed that the institution's termination based on poor performance was not an arbitrary or unreasonable employment action.[147] Another case upheld an institution's finding of gross insubordination as the basis for termination.[148] However, a California court found error when the state personnel board allowed an institution to amend the charges against a dismissed employee after the termination hearing.[149] A terminated coach was unable to show that he had a contractual right to be reassigned to another position.[150] However, a New York employee, citing a policy stating that administrators could only be terminated for cause, successfully stopped a motion to dismiss his breach of contract claim emanating from his termination.[151]

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[138] Hullman v. Board of Trustees of Pratt Community College, 725 F. Supp. 1536 (D. Kan. 1989).

[139] Hullman v. Board of Trustees of Pratt Community College, 732 F. Supp. 91 (D. Kan. 1990).

[140] Kemp v. State Bd. of Agric., 790 P. 2d 870 (Colo. Ct. App. 1989).

[141] State *ex rel.* Cooper v. Moorhead State Univ., 455 N.W. 2d 79 (Minn. Ct. App. 1990).

[142] Campbell v. State, 551 N.Y.S.2d 100 (App. Div. 1990).

[143] Burge v. Western Pa. Higher Educ. Council, Inc., 570 A.2d 536 (Pa. Super. Ct. 1990).

[144] Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230 (Dist. Ct. App. 1990).

[145] *Id.* at 231.

State laws were used to challenge the termination of administrators and staff of colleges and universities. A West Virginia employee, terminated after being injured on the job, used the state's Human Rights Act to claim the right to reemployment.[152] Following the injury, the institution attempted to accommodate the job to compensate for the disability. Since the employee was still unable to perform requisite tasks, she was not an "otherwise qualified handicapped individual" under the Act and the Act did not obligate the institution to assign the employee to a new job. A black employee, on appeal, was able to show that he had a legitimate cause of action for intentional infliction of emotional distress, but not intentional interference with an economic relationship.[153] Interference with an economic relationship was not viable because the court said that a loss of sick days was not enough to support this claim. However, discriminatory harassment in the form of racial slurs and abusive language and behavior supported the other claim. In Alabama, under the state's Fair Dismissal Act, waiting eighteen months to file a claim resulted in the claim being barred by laches.[154]

Defamation was at issue in a North Carolina case.[155] While the court granted the defending institution summary judgment on the claim of breach of contract when it terminated the employment of a research assistant, the court found that material issues existed in the claim of defamation for statements made in the termination letter impeaching the researcher's professional skills. Questions of false imprisonment also required litigation

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146. Vannerson v. Board of Regents of Univ. of Okla., 784 P.2d 1053 (Okla. 1989).
147. Kelly v. Board of Trustees of the Univ. of Ill., 559 N.E.2d 196 (Ill. App. Ct. 1990).
148. Sexton v. Marshall Univ., 387 S.E.2d 529 (W. Va. 1989).
149. Brooks v. California State Personnel Bd., 272 Cal. Rptr. 292 (Ct. App. 1990).
150. Frazier v. University of D.C., 742 F. Supp. 28 (D.D.C. 1990).
151. Aharanwa v. Trustees of Columbia Univ. in City of N.Y., 557 N.Y.S.2d 76 (App. Div. 1990).
152. Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1 (W. Va. 1988).
153. Franklin v. Portland Community College, 787 P.2d 489 (Or. Ct. App. 1990).
154. Hughes v. Britnell, 554 So. 2d 1041 (Ala. Civ. App. 1989).
155. Kwan-Sa You v. Roe, 387 S.E.2d 188 (N.C. Ct. App. 1990).

stemming from the university's action of detaining the researcher and requiring a psychiatric examination.

Damages for termination or dismissal resulted in different rulings in various states. For example, in Louisiana, the State Civil Service Commission awarded a former employee back pay and reinstatement but denied interest on the back-pay and attorney fees.[156] The Fifth Circuit upheld a lower court decision dismissing a demoted black administrator's claim and assigning damages in the form of attorney fees to the plaintiff's attorney based on misconduct during prosecution of the claim.[157]

Several dismissal cases involved criminal prosecution. In one case, the court found evidence sufficient to support an embezzlement conviction of two administrators in the bursar's office of a professional school of a university.[158] In another case, a business manager could not be forced to make a donation to a university's charitable foundation as part of his criminal sentence.[159]

Finally, a case involving mandatory drug testing for Department of Education staff was before the courts.[160] The court ruled that testing of motor vehicle operators was constitutionally permissible, but the Department failed to show a compelling interest in testing data processors. The court also ruled that testing could be required if reasonable suspicion existed as opposed to actual proof of job impairment.

All Employees

Sexual Harassment. In one case reported previously,[161] the court ruled that the designation of two witnesses classified as experts on sexual harassment as "expert witnesses" prejudices the fact-finding capabilities of the jury.[162] The court noted that the knowledge of the witnesses "fails to rise to the level of specialized knowledge necessary to qualify them as experts."[163] In Michigan, an assaulted student and a rape crisis center counselor were charged by the accused graduate assistant with interference with contract, slander, and intent to inflict emotional distress.[164] Both the counselor and the victim contacted the department where the graduate

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156. Johnson v. Southern Univ., 551 So. 2d 1348 (La. Ct. App. 1988).
157. John v. Louisiana, 899 F.2d 1441 (5th Cir. 1990).
158. People v. McCorgray, 558 N.Y.S.2d 545 (App. Div. 1990).
159. Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990).
160. American Fed'n of Gov't Employees, AFL-CIO v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989).
161. *See* The Yearbook of School Law 1987 at 268, Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986); *aff'd*, See The Yearbook of Education Law 1990 at 236, Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).
162. Lipsett v. University of P.R., 740 F. Supp. 921 (D.P.R. 1990).
163. *Id.* at 924.
164. Rosenboom v. Vanek, 451 N.W.2d 520 (Mich. Ct. App. 1989).

assistant held a position to inquire about what the department would do about this situation. The court found that the institution's policy of promoting the reporting of sexual harassment incidents precluded the slander charge after criminal charges were dismissed.

Denial of Employee Benefits. A Michigan professor sought access to letters of recommendation from department heads and deans regarding recommendations for salary increases.[165] The court found that salary recommendations were exempt from the Employee Right To Know Act. An Oregon court affirmed the eligibility for unemployment compensation of a part-time instructor laid off at the end of the 1988 winter term.[166] However, a New York court reversed a lower court award of unemployment benefits to a faculty member not employed for summer school.[167] A student who resigned his position to attend law school was not qualified for unemployment benefits.[168] On appeal, a fired president was able to reverse a summary judgment favoring the institution.[169] At issue was the salary for the remainder of the terminated contract agreement and retirement benefits.

Other benefits besides salary were also litigated. In a bankruptcy proceeding, the court found that The College Retirement Equity Fund (CREF) annuity was a spendthrift trust excluded from the bankruptcy estate, while Teachers Insurance and Annuity Association (TIAA) retirement annuity, as an annuity, was part of the bankruptcy estate.[170] In another case, a printer was allowed to purchase service credits toward retirement for previous service performed out of state.[171] The award of disability benefits to a terminated employee was appropriate where a good faith effort to search for alternate positions was attempted; however, further payments should have ceased when medical evidence indicated that the plaintiff had the ability to work but had not attempted in good faith to find a job.[172] An Alabama court certified a class of community and technical college employees in a suit against a self-funded insurance plan.[173]

Collective Bargaining. Collective bargaining issues reached the courts again this year. Membership in the bargaining unit was before the court in one case. The Supreme Court of Vermont ruled that adjunct, part-time faculty with reasonable expectations of reemployment were state employees eligible for protection under the state labor laws.[174] However, the court ruled that different interests from full-time faculty negated their claim for membership in the full-time faculty bargaining unit.

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[165] Muskovitz v. Lubbers, 452 N.W.2d 854 (Mich. Ct. App. 1990).

[166] Mt. Hood Community College v. Employment Div., 790 P.2d 1164 (Or. Ct. App. 1990).

[167] *In re* Abramowitz, 550 N.Y.S.2d 75 (App. Div. 1989).

[168] Sonneman v. Knight, 790 P.2d 702 (Alaska 1990).

[169] Lovett v. Mt. Senario College, Inc., 454 N.W.2d 356 (Wis. Ct. App. 1990).

[170] Morter v. Farm Credit Servs., 110 B.R. 390 (N.D. Ind. 1990).

[171] Barckley v. State Employees' Retirement Bd., 566 A.2d 343 (Pa. Commw. Ct. 1989).

[172] University of Fla. v. Stone, 553 So. 2d 359 (Fla. Dist. Ct. App. 1989).

[173] Harbor Ins. Co. v. Blackwelder, 554 So. 2d 329 (Ala. 1989).

[174] Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 566 A.2d 955 (Vt. 1989).

In Michigan, union dues for nonmembers were challenged on religious grounds. A federal district court had upheld the discharge of an employee of a university for refusal to pay nonmember union dues.[175] The Sixth Circuit Court reversed and remanded the decision.[176] The court found that the scheme to refund the plaintiff's challenged union dues did not take into account religious beliefs which prevented any association with unions. An Illinois court found that nonmembers should be given a hearing prior to the collection of "fair share" dues.[177] The court found that the establishment of an escrow account for the deposit of challenged fees would be necessary to prevent the use of funds for improper purposes.

Unfair labor practices were brought to the courts. A California court found that it was not an unfair labor practice to contract with another organization to teach evening courses which had previously been covered by its full-time faculty. Key to resolving the case was the fact that the courses were not being taught by the full-time faculty at the time the contract was signed.[178] However, expanding the contract with the external agency to courses currently taught by the college's part-time instructors was an unfair labor practice. In New Jersey, employees who challenged a public university's calculation of their biweekly pay were not state employees under state statutes, and jurisdiction was transferred to the appropriate tribunal.[179] A California court held that a state university must pay the prevailing wage required by law for public works which do not involve the institution's internal affairs.[180]

As previously reported, the Supreme Court ruled that a university mail service did not deliver "letters of the carrier" nor was it a "private without compensation carrier," both exceptions to the United States Postal Service monopoly.[181] On remand to the state labor relations board, the board found that the institution had committed an unfair labor practice by refusing to deliver union mail through its campus mail system. On appeal the court found that it was an error to rely on previously vacated rulings to reach a decision, and the board had not properly determined whether the union using university mail services was a violation of the monopoly protection of the Postal Service.[182] A Washington university was accused of an unfair labor practice by entering into a contract with a local city to provide police protection.[183] The court found that the state law granting universities the power to form police departments, or to contract for services with local government, did not supersede the higher education personnel law. Accordingly, it was illegal to lay off police officers employed by the university and to execute a contract with the city police.

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[175] *See* The Yearbook of Education Law 1990 at 214, EEOC v. University of Detroit, 701 F. Supp. 1326 (E.D. Mich. 1988).

[176] EEOC v. University of Detroit, 904 F.2d 331 (6th Cir. 1990).

[177] Antry v. Illinois Educ. Labor Relations Bd., 552 N.E.2d 313 (Ill. App. Ct. 1990).

[178] San Diego Adult Educators, Local 4289, Am. Fed'n of Teachers v. Public Employment Relations Bd., 273 Cal. Rptr. 53 (Dist. Ct. App. 1990).

[179] Meehan v. Nassau Community College, 548 N.Y.S.2d 741 (App. Div. 1989).

[180] Division of Labor Standards Enforcement v. Ericsson Information Sys., Inc., 270 Cal. Rptr. 75 (Ct. App. 1990).

[181] *See* The Yearbook of Education Law 1989 at 219, Regents of the Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589 (1988).

[182] Regents of the Univ. of Cal. v. Public Employment Relations Bd., 269 Cal. Rptr. 563 (Ct. App. 1990).

A number of collective bargaining cases involved grievance procedures. A court upheld a hearing officer's decision in favor of the union and the award of attorney fees to the union in a grievance over the lengthening of summer school.[184] Nurses requesting steady assignment to the evening shift grieved the issue with the university. The court found that the university violated the State Labor Relations Act by refusing to go to arbitration.[185] A Louisiana court upheld the surveillance and suspension for five working days without pay of an employee who violated the institution's sick leave provisions.[186]

Issues regarding the wages of employees used to staff a university public works project under state contract were before a California court.[187] The court found that the university must conform to the wage laws governing public works projects which do not involve the university's internal affairs.

STUDENTS

Admissions

A Fifth Circuit held that an applicant who was rejected from a graduate school, but was permitted to audit a class at the university, was not classified as a "student" in accordance with the Family Educational Rights and Privacy Act.[188] The rejected applicant did not have access to admission information as would an enrolled student. In a Florida case, at issue was whether an applicant who was denied admission to a public law school was entitled to a hearing under the state's Administrative Procedures Act.[189] After notification of denial of admission, a letter was sent to the plaintiff which provided an explanation of the process and reasons for the denial. The court determined that a student, who was also an applicant, was not entitled to a formal administrative hearing, and that his "sincere interest in the study of law" did not qualify him for a hearing under the provisions of the Act.

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[183] Western Wash. Univ. v. Washington Fed'n of State Employees, 793 P.2d 989 (Wash. Ct. App. 1990).

[184] Board of Trustees of Hillsborough Community College v. Hillsborough Community College Chapter of Faculty United Serv. Ass'n, 563 So. 2d 1102 (Fla. Dist. Ct. App. 1990).

[185] University of Pittsburgh, W. Psychiatric Inst. & Clinic v. Pennsylvania Labor Relations Bd., 578 A.2d 66 (Pa. Commw. Ct. 1990).

[186] Claverie v. L.S.U. Medical Center in New Orleans, 553 So. 2d 482 (La. Ct. App. 1989).

[187] Division of Labor Standards Enforcement v. Ericsson Information Sys., 270 Cal. Rptr. 75 (Ct. App. 1990).

[188] Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989).

[189] Metsch v. University of Fla., 550 So. 2d 1149 (Fla. Dist. Ct. App. 1989).

A disgruntled father filed suit against the National Collegiate Athletic Association (NCAA) when his son was denied admission at a state university.[190] The court found no cognizable claim against the NCAA and dismissed the case.

In other action, a college student failed to prove extreme and outrageous conduct by college administrators.[191] The student, dismissed from a program in rude and insulting terms, failed to establish cause of intentional infliction of emotional distress.

In New York, admissions tests involving the Educational Testing Service (ETS) were before the courts again. In one case, a student's test was pulled during the testing period by a proctor investigating irregularities suspected by another student.[192] The student demanded a retake of the test at an unscheduled time. The court, finding testing irregularities in procedures, awarded the plaintiff the requested injunctive relief. In another decision, the court found the testing service, within the confines of the contract between the examinee and the testing service, could cancel the scores due to irregularities in the administration of the test.[193] A due process claim could not be asserted due to an absence of evidence of state action.

Nonresident Tuition

A New Hampshire case raised the issue of whether, for tuition purposes, the son of a foreign services employee was a resident of the state.[194] New Hampshire law required that one must be domiciled in the state for twelve consecutive months before establishing residency for tuition purposes. The father, after graduating from college in New Hampshire, had worked in the foreign service and had legally been a resident of Virginia. In the year his son was to attend college, an attempt to establish residency was made by purchasing a home, registering to vote, and meeting other requirements. The father went back into the foreign service, was assigned to another country but listed his domicile as New Hampshire. The state supreme court affirmed the trial court's finding that the father had failed to be domiciled in the state for the required period of twelve months in order to establish residency for his son. The length of time of the parents' residency in the state was pivotal since the son was listed as a dependent.

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[190] Peebles v. National Collegiate Athletic Ass'n, 723 F. Supp. 1155 (D.S.C. 1989).

[191] Rudis v. National College of Educ., 548 N.E.2d 474 (Ill. App. Ct. 1989).

[192] Mindel v. Educational Testing Serv., 559 N.Y.S.2d 95 (Sup. Ct. 1990).

[193] Yaeger v. Educational Testing Serv., 551 N.Y.S.2d 574 (App. Div. 1990).

[194] Bisson v. University of N.H., 578 A.2d 320 (N.H. 1990).

Financial Aid

With increasing college expenses and further constraints on federal and state budgets, financial aid issues once again were prevalent in the courts. Several bankruptcy cases centered around educational loan debts. In a California case, a university was found to have violated automatic stay provisions of bankruptcy law by withholding a debtor's transcripts unless he would reaffirm his educational loan debt.[195] "Compensable injury" was also determined and attorney fees were awarded to the debtor. Automatic stay violations were denied in a Pennsylvania bankruptcy case.[196] The debtor failed to state a claim for a civil rights violation, and the higher education assistance agency did not discriminate against a debtor when it refused to award a grant. In order to determine the dischargeability of a student loan, the burden of proof is split between the creditor, who must prove a debt exists, and the debtor, who must prove undue hardship. A Pennsylvania court determined that health problems and unemployment did not qualify in the present case as an "undue hardship" resulting in a discharge of his debt.[197] An Alabama court found that a pending divorce, lose of spouse's income, and size of the loan payment were not undue hardship.[198] However, a Maryland divorced mother of three children, whose exhusband was incurably ill, proved hardship, and the loans of two other former students also were discharged.[199]

Under chapter thirteen plans, bankruptcy cases were brought before the courts. In Kansas, a district court remanded a case to the bankruptcy court where the debtor filed her repayment plan in good faith as required by law.[200] The court failed to make specific findings regarding the debtor's primary purpose in filing a chapter thirteen plan before claiming that the plan was filed in bad faith. A bankruptcy court in Ohio denied the confirmation of a chapter thirteen plan after it determined that the debtor's partial repayment of loans was not sufficient sacrifice as required for granting debt relief under chapter thirteen.[201]

Three separate plaintiffs who held defaulted student loans brought action seeking judgment to recover tax refunds intercepted by the Internal Revenue Service (IRS). The United States Court of Appeals, reversing a district court decision, found that tax refunds collected by the IRS to offset defaulted student loans were time barred.[202] Ten years had passed since the loans had been declared delinquent barring collection by tax refund offset. A similar case occurred in Kansas where the Tenth Circuit Court of Appeals ruled that the attorney general had a six year statute of limitations to bring suit on a defaulted student loan, making collection by tax refund offset time barred.[203] In Delaware, a student borrower was also entitled to his tax refund after the court found that private, not-for-profit cooperations could not act as debt collectors under the Federal Debt Collection Practices Act.[204] However, a former student in Alabama failed to reclaim her tax refund which was used to offset a defaulted student loan.[205] The court of appeals affirmed an earlier decision that the statute of limitations commenced when the loan was assigned to the Department of Education for collection.

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[195] Gustafson v. California State Univ., Fresno, 11 B.R. 282 (Bankr. 9th Cir. 1990).

[196] *In re* Saunders, 105 B.R. 781 (Bankr. E.D. Pa. 1989).

[197] *In re* Burton, 117 B.R. 167 (Bankr. W.D. Pa. 1990).

[198] *In re* Doyle, 106 B.R. 272 (Bankr. N.D. Ala. 1989).

[199] *In re* Clemmons, 107 B.R. 488 (Bankr. D. Del. 1989); *In re* Griffin, 108 B.R. 717 (Bankr. W.D. Mo. 1989); *In re* Reilly, 118 B.R. 38 (Bankr. D. Md. 1990).

[200] *In re* Stewart, 109 B.R. 998 (D. Kan. 1990).

[201] *In re* Carpico, 117 B.R. 335 (Bankr. S.D. Ohio 1990).

[202] Grider v. Cavazos, 911 F.2d 1158 (5th Cir. 1990).

Both federal and state officials filed suits against individuals who defaulted on student loans. In Louisiana, the federal government's motion to collect on a defaulted National Health Service Corps (NHSC) Scholarship Program Loan was granted.[206] The physician failed to begin his service at the assigned Health Manpower Shortage Area or to pay the debt when his service option was terminated. In similar action, the government filed suit to recover the full amount of the scholarship provided to a participant in the Public Health and National Health Service Corps Scholarship Training Program.[207] The defaulting participant claimed that his debt should be prorated for that portion of the required four years of service he actually completed before termination. The United States Court of Appeals affirmed an earlier decision that the statute governing the repayment obligation to the government did not provide for proration if the service was partially completed. In Florida, the government was again granted a motion to collect on a defaulted student loan where the student's contract breach stopped a claim that the lending agency had not acted in good faith.[208] In New York, the statute of limitations barred collection on a student loan.[209]

Divorce and child support were at issue in a number of cases. A divorced Indiana father, whose twenty-one year old daughter was a college graduate with a baccalaureate degree, was no longer responsible to pay half of her college expenses.[210] The New Jersey Supreme Court ruled that the divorced father's contribution to the daughter's college education

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203. Hurst v. United States Dep't of Educ., 901 F.2d 836 (10th Cir. 1990).
204. Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990).
205. Jones v. Cavazos, 889 F.2d 1043 (11th Cir. 1989).
206. United States v. Gross, 725 F. Supp. 892 (W.D. La. 1989).
207. United States v. Barry, 904 F.2d 29 (11th Cir. 1990); *see* Yearbook of Education Law 1990 at 229, United States v. Barry, 719 F. Supp. 1047 (M.D. Ala. 1989).
208. United States v. McGill, 734 F. Supp. 1014 (S.D. Fla. 1990).
209. State v. Cohen, 551 N.Y.S.2d 688 (App. Div. 1990).
210. Shriver v. Kobold, 553 N.E.2d 867 (Ind. Ct. App. 1990).

should be based on an evaluation of his ability to pay.[211] In South Dakota, the Supreme Court affirmed a lower court decision which substantiated the existence of a divorce decree providing that the husband would pay all of the regular costs of their child obtaining a college education (undergraduate degree).[212] A student in Pennsylvania sued her adoptive father to recover financial support for college.[213] The court found no willful estrangement relieving the father of his responsibilities for providing financial support. The court of appeals in Indiana also awarded judgment for financial support to a student and denied a petition for modification of child support by the father.[214] In this instance, the student was working but was unable to support herself completely.

Fraud was at issue in a South Dakota case.[215] A North Dakota student filed for a student loan in South Dakota, and obtained the loan by use of a false statement. Her convictions were affirmed in the circuit court. In Kansas, a college filed a motion seeking declaratory judgment and injunctive relief in claiming that the guaranty agency violated provisions of the Higher Education Amendments of 1986.[216] The college was an eligible participant in various title IV federal financial assistance programs and could not have student loan applications filed by eligible students denied by the guaranty agency. An institution offering correspondence and residential training courses in truck driving and heavy equipment operation sought an injunction preventing implementation of a decision suspending government student financial aid programs.[217] The Seventh Circuit Court of Appeals found the institution had legitimate liberty and property interests requiring due process which was given by the Department of Education. A business school was ordered to refund Tuition Assistance Program (TAP) awards to students during academic terms when the institution failed to meet the full-time attendance requirement for purposes of TAP eligibility.[218] Similarly, Tuition Assistance Programs were also at issue in New York.[219] Funds were cut off to a corporation operating four private business schools after they ceased operations in mid-term. The court found that the requirements for award eligibility were not satisfied because minimum hours of instruction were not met.

The collection of costs of educational programs were before the courts and involved several types of disputes. The New York Supreme Court dismissed the petition of a doctor who had been denied access to a student loan forgiveness program.[220] The court found neither arbitrary action nor violation of due process. In South Carolina, a former Air Force Academy Cadet was ordered to pay educational costs to the government after he resigned while facing drug charges.[221] The statute and statement of understanding signed by all Air Force Cadets authorizes the government to recover all costs if the educational requirements or active-duty service commitments are not fulfilled. The amount of attorney fees that may be recovered from a borrower who defaults on a Perkin's student loan was brought to the attention of the Appeals Court of Massachusetts.[222] The state court determined that the borrower was liable for attorney fees where they are expressly provided in the note, but that the fee is limited to what is considered fair and reasonable. Recovery of promissory notes by the university also came up in the courts. In two cases, the university succeeded in the recovery of funds from the student after default was declared.[223]

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[211] Enrico v. Goldsmith, 568 A.2d 576 (N.J. Super. Ct. App. Div. 1990).

[212] Kier v. Kier, 454 N.W.2d 544 (S.D. 1990).

[213] Fager v. Fatta, 576 A.2d 1089 (Pa. Super. Ct. 1990).

[214] Brancheau v. Weddle, 555 N.E.2d 1315 (Ind. Ct. App. 1990).

[215] United States v. Redfearn, 906 F.2d 352 (8th Cir. 1990).

[216] St. Mary of the Plains College v. Higher Educ. Loan Program of Kan., Inc., 724 F. Supp. 803 (D. Kan. 1989).

[217] Continental Training Servs., Inc. v. Cavazos, 893 F.2d 877 (7th Cir. 1990).

[218] Drake Business Schools Corp. v. New York State Higher Educ. Servs. Corp., 550 N.Y.S.2d 188 (App. Div. 1990).

[219] Oliver Schools, Inc. v. Sobol, 558 N.Y.S.2d 828 (Sup. Ct. 1990).

A number of cases saw state agencies, which were established to guarantee student loans, challenge the constitutionality of federal laws requiring agencies to transfer excess revenues to the Secretary of Education and permitting the Secretary to withhold reimbursements. In South Carolina, the federal court of appeals denied a rehearing and affirmed all earlier decisions[224] that excess reserve funds held by the agencies were not "private property" and the transfer of funds back to the government could be required.[225] Similarly, in Wisconsin, another case in the courts for the past few years[226] was decided in favor of the government, supporting the stipulations of the amendments to the Higher Education Act allowing the recovery of excess cash in the reserves of state guarantee agencies.[227] This constitutional issue of withholding reimbursement in order to recapture excess reserve funds was also challenged in South Dakota, Ohio, Georgia, Delaware, and North Carolina.[228] In each instance, judgment was rendered in favor of the Secretary. The courts found no violation of property rights under the fifth amendment of the Constitution in the provisions of the 1987 amendments to the Higher Education Act implementing specific levels of reserve funds at the various state agencies.

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[220] Van Bellingham v. Department of Educ., 555 N.Y.S.2d 571 (Sup. Ct. 1990).

[221] United States v. McCrackin, 736 F. Supp. 107 (D.S.C. 1990).

[222] Trustees of Tufts College v. Ramsdell, 554 N.E.2d 34 (Mass. App. Ct. 1990).

[223] Yale Univ. Adjustment Serv. v. Gallichon, 572 A.2d 388 (Conn. Ct. App. 1990); Board of Regents of S.W. Mo. State Univ. v. Harriman, 792 S.W.2d 388 (Mo. Ct. App. 1990).

[224] *See* The Yearbook of Education Law 1990 at 225, South Carolina State Educ. Assistance Auth. v. Cavazos, 716 F. Supp. 886 (D.S.C. 1989).

[225] South Carolina State Educ. Assistance Auth. v. Cavazos, 897 F.2d 1272 (4th Cir. 1990).

[226] *See* The Yearbook of Education Law 1990 at 224, Great Lakes Higher Educ. Corp. v. Cavazos, 698 F. Supp. 1464 (W.D. Wis. 1988), *rehearing*, 711 F. Supp. 485 (W.D. 1989).

[227] Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10 (7th Cir. 1990).

[228] Ohio Student Loan Comm'r v. Cavazos, 900 F.2d 894 (6th Cir. 1990); Education Assistance Corp. v. Cavazos, 902 F.2d 617 (8th Cir. 1990); Delaware v. Cavazos, 723 F. Supp. 234 (D. Del. 1989); North Carolina v. United States, 725 F. Supp. 874 (E.D.N.C. 1989); Georgia Student Finance Comm'n v. Cavazos, 741 F. Supp. 899 (N.D. Ga. 1990).

Student Organizations

Income set aside for charitable purposes was at issue in a case involving a college fraternity.[229] Income derived from a special endowment may not be tax exempt if the organization utilizes it for nonexempt purposes. The Sixth Circuit Court of Appeals affirmed a decision from the United States Tax Court that income used by a fraternity to pay for publication costs of its quarterly periodical was not exempt income. The fraternity used money in the fund to pay for the periodical as well as necessary expenses incurred in the administration of the trustees and for the payment of other necessary expenses of the fraternity in general.

First Amendment

Freedom of Speech. A case brought against college administrators by a community college teacher and a student was reversed and remanded by a state court of appeals.[230] The administrators at the college summarily canceled a dance class in which a controversial play containing vulgar language was to be performed. The court found that the community college teacher and former student had standing to challenge violations of their rights of free speech under both the United States and California Constitutions. The action claim was not moot since the student and the teacher were both still at the community college. The institution failed to support a summary judgment by providing valid reasons for canceling the class.

A former editor in chief of a student-run newspaper at a community college challenged the conduct of the college in prohibiting publication of an advertisement in the newspaper.[231] An advertisement for a Canadian nude dancing club was prohibited from publication by the college newspaper since it promoted both underage drinking and degradation of women, alleged to be contrary to Michigan law and school policy. Summary judgment was granted to the plaintiff because the community college had violated the first amendment rights of the editor in chief. The college's regulation on advertising, tailored to discourage the degradation of women and underage drinking, was not narrow enough to identify a state or institutional interest.

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[229] Phi Delta Theta Fraternity v. Commissioner of Internal Revenue, 887 F.2d 1302 (6th Cir. 1989).

[230] DiBona v. Matthews, 269 Cal. Rptr. 882 (Ct. App. 1990).

[231] Lueth v. St. Clair County Community College, 732 F. Supp. 1410 (E.D. Mich. 1990).

In Indiana, on appeal, a former dormitory resident assistant brought suit against the state university trustees when he was not rehired.[232] The resident assistant claimed he was not rehired because of a disagreement with his political statement concerning the Vietnam War and his display of an automatic rifle in his dormitory room, both violations of his rights of freedom expression. The court found evidence supporting the university's assertion of behavioral problems amounting to insubordination as well as displaying poor judgment in his role as a resident assistant, both valid reasons for the nonrenewal decision.

Dismissal

Disciplinary Dismissal. There were numerous cases involving disciplinary dismissal due to academic dishonesty. Two cases involving plagiarism were in the courts during this reporting period. In a case that has been in litigation for several years,[233] a dismissed law student claimed that the judge in the case was impartial since he graduated from the same law school.[234] The Sixth Circuit Court of Appeals found that there was no abuse of discretion or evidence of impartiality. In another plagiarism case, a New York court decided that a student was denied due process resulting from an associate dean's failure to reveal factual findings and evidence used to make a decision of guilt on a plagiarism charge.[235]

The alleged violation of the due process clause was also charged in a couple of academic dishonesty dismissal cases. In Minnesota, two former law students filed action alleging violation of due process and breach of contract after they were suspended from school for one year.[236] They were found guilty of violating the honor code by the university. Due process was not violated when proper proceedings were provided nor was the contract breached by adoption of an honor code. Lack of procedural due process as a claim could not be raised for the first time on appeal in a New York case involving academic dishonesty.[237] The court also determined that the penalty of suspending the student during the senior year was neither harsh nor excessive.

Cheating was at the center of four other cases dealing with academic dishonesty among graduate students. In one instance, a student claimed that the college acted arbitrarily when she received a failing grade due to cheating; furthermore, her grade point average fell below 3.0 causing her automatic dismissal.[238] The dismissal was upheld by the court. In a second case, twin brothers who were dismissed from medical school after having been caught cheating in a course, successfully established protractable interest by alleging contract rights.[239] They agreed to certain provisions with the understanding they would be allowed to continue their medical education. Affirming the injunction for them to remain in school pending a resolution of their lawsuit, the court also decided that irreparable injury would be incurred if their medical school careers were interrupted during litigation. In Pennsylvania, the superior court reversed a lower court decision and found that there was no basis for interfering with the right of a private school to impose sanctions on students for conduct found to be "compatible with cheating."[240] Finally, a Florida court, in a controversy over cheating on an exam, ruled that a student must pursue the institution's administrative remedies before she would have a right of action in court.[241]

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[232] Shelton v. Trustees of Ind. Univ., 891 F.2d 165 (7th Cir. 1989).

[233] *See* The Yearbook of Education Law 1990 at 233, Easley v. University of Mich. Bd. of Regents, 444 N.W.2d 820 (Mich Ct. App. 1989); *see also* The Yearbook of Education Law 1989 at 235, Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir.1988); *see also* The Yearbook of School Law 1987 at 266, Easley v. University of Mich. Bd. of Regents, 632 F. Supp. 1539 (E.D. Mich. 1986); 627 F. Supp. 580 (E.D. Mich. 1986); *see also* The Yearbook of School Law 1986 at 272, Easley v. University of Mich. Bd. of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).

[234] Easley v. University of Mich. Bd. of Regents, 906 F.2d 1143 (6th Cir. 1990).

[235] Kalinsky v. State Univ. of N.Y., 557 N.Y.S.2d 577 (App. Div. 1990).

[236] Shuman v. University of Minn. Law School, 451 N.W.2d 71 (Minn. Ct. App. 1990).

[237] Rauer v. State Univ. of N.Y. at Albany, 552 N.Y.S.2d 983 (App. Div. 1990).

There were other cases involving disciplinary dismissal. Due process procedures were not followed in a Louisiana case where a theological seminary student was dismissed and denied a diploma because of marital difficulties.[242] At issue was not the ecclesiastical matter between a church and a minister, but rather a contractual dispute between a school and its student. The court refused to accept the validity of the student's dismissal because the faculty committee failed to exercise due process procedures articulated in the school's policy documents.

A New York court held that the three-month delay in initiating disciplinary charges against a university student was abuse of discretion and violated the student's right to a prompt hearing.[243] In Alabama, a graduate law school student sued to block disciplinary action after it was learned that the student had been barred from practicing law in other states.[244] The student's motion was denied and sanctions on the student were ordered after the court determined that the graduate law student's personal attacks on the law school dean, magistrate, and district judge warranted sanctions.

The last case in this area was a suit claiming violations of constitutional rights. A former midshipman was terminated from the United States

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[238] Braham v. Brown, 548 N.Y.S.2d 440 (App. Div. 1989).

[239] James v. Wall, 783 S.W.2d 615 (Tex. Ct. App. 1989).

[240] Boehm v. University of Pa. School of Veterinary Medicine, 573 A.2d 575 (Pa. Super. Ct. 1990).

[241] Florida Bd. of Regents v. Armesto, 563 So. 2d 1080 (Fla. Ct. App. 1990).

[242] Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90 (La. Ct. App. 1989).

[243] Machosky v. State Univ. of N.Y. at Oswego, 546 N.Y.S.2d 513 (Sup. Ct. 1989).

[244] Katz v. Looney, 733 F. Supp. 1284 (W.D. Ark. 1990).

Naval Academy after admitting his homosexuality. The district court first dismissed a motion claiming (1) that there was no requirement for exhausting administrative remedies before filing suit and (2) that the Tucker Act did not apply to the case.[245] In a motion for dismissal of the same case, the court stated that the former midshipman was not excused from answering a deposition question regarding homosexual acts committed while at the academy.[246] The case was subsequently dismissed with prejudice.

Academic Dismissal. Cases involving academic dismissal once again had a significant role in the courts. Of the nine cases, six were by students in professional schools. In Colorado, a resident trainee was dismissed from the medical school's residency training program.[247] Since the required thirty-day written notice was not provided, the student claimed that the dismissal violated due process of law. The court affirmed that due process does not require a formal hearing before termination but, in turn, reversed a lower court decision stating that the dismissal did violate the notice provision of an agreement between the trainee and the program. The case was remanded.

A former medical student in Iowa sought preliminary injunctive relief, disqualification of her defense counsel, and stayed proceedings in federal court pending an administrative hearing.[248] The student was a third-year medical student who was dismissed from the university for poor clinical performance. The court found that the student was not entitled to preliminary injunction for reinstatement while the merits of her claim were adjudicated. A former Kentucky medical student sued the university for what he claimed was an unlawful dismissal and a deprivation of his liberty interest in his reputation.[249] A liberty interest was an issue because an associate dean of student affairs and the dean of the medical school disclosed a letter by the student's former psychiatrist to the student affairs committee, resulting in the student's dismissal. The Sixth Circuit Court of Appeals held that the eleventh amendment barred suit against a state university in federal court and that the former student was not deprived of a liberty interest. In still another case involving a former medical student,[250] the New York Supreme Court decided that a medical school's dismissal of a student for academic reasons was not arbitrary or capricious. The student displayed difficulty in achieving acceptable grades throughout his first two years and repeated the third-year medical rotation before being dismissed for academic deficiency.

In Mississippi, a former dental student alleged violations of his constitutional rights to due process and free speech after being dismissed for academic reasons.[251] The district court held that an adequate appeal process was instituted and that the student's due process was not violated. It was also found that eleventh amendment immunity was not waived by the state, thus the court lacked jurisdiction to adjudicate claims against university trustees since the claims in reality were against the state.

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[245] Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1990).

[246] Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1990).

[247] Dillingham v. Univ. of Colo., Bd. of Regents, 790 P.2d 851 (Colo. Ct. App. 1989).

[248] Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990).

[249] Cowan v. University of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990).

[250] Chusid v. Albany Medical College of Union Univ., 550 N.Y.S.2d 507 (App. Div. 1990).

The Supreme Court of New York earlier dismissed a petition by a law student who was dismissed for academic deficiency.[252] On appeal, the New York Court of Appeals found no evidence of either arbitrariness or a constitutional violation associated with the assignment of a poor grade in a course which resulted in the student's dismissal for a deficient grade point average.

Grades were also at issue in cases involving undergraduate students. In Tennessee, a former nursing student was dismissed from the state nursing program and denied readmission after receiving two substandard grades.[253] The court of appeals upheld a lower court decision that the policy requiring dismissal was constitutional. A student in Texas attempted to use the Family Educational Rights and Privacy Act in challenging a grade he received in a university physics class.[254] The district court held that the Act does not provide the means to obtain information on the assignment of grades.

In the final case, a dismissed nursing student sought damages for invasion of privacy and intentional infliction of emotional distress.[255] The student failed her clinical course partially due to her obesity and claimed a breach of contract. A trial court had found that a breach of contract was in order and awarded monetary damages to the student,[256] but did not find evidence of intentional infliction of emotional distress by the college. On consolidated appeals, the court of appeals affirmed the decision of the district court in all respects.

Other Constitutional Issues

In Kansas, a former student at a community college alleged deprivation of property without due process after fines were levied against him by the college baseball coach.[257] The district court granted summary judgment on claims of deprivation of a liberty interest in playing basketball by the enforcement of rules limiting hair length, prohibiting facial hair, and restricting dress. The court found issues of merit in claims of deprivation of property in violation of due process and fraudulent misrepresentation in the levy of fines.

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[251] Davis v. Mann, 721 F. Supp. 796 (S.D. Miss. 1989), *aff'd*, 882 F.2d 967 (5th Cir. 1989).

[252] Susan M. v. New York Law School, 556 N.E.2d 1104 (N.Y. Ct. App. 1990).

[253] Lilly v. Smith, 790 S.W.2d 539 (Tenn. Ct. App. 1990).

[254] Tarka v. Cunningham, 741 F. Supp. 1281 (W.D. Tex. 1990).

[255] Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989).

[256] *See* The Yearbook of Education Law 1988 at 258, Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986).

[257] Lesser v. Neosho County Community College, 741 F. Supp. 854 (D. Kan. 1990).

Discrimination was claimed by the white college student editors of an off-campus newspaper of a private college.[258] The students were suspended by the private college after writing an article critical of a black professor and subsequently alleged that their suspension was racially motivated. The First Circuit Court of Appeals affirmed an earlier decision that the claim did not state any cause of action under title VI or section 1981 and that the college's handling of the situation fell outside the purviews of the court.

Discrimination was also contested in two other cases. In New Jersey, a female university undergraduate student claimed gender discrimination against the eating clubs at Yale University.[259] The Supreme Court of New Jersey stated that the relationship between the allegedly private eating clubs and the university was "symbiotic" thus prohibiting discrimination. In Michigan, the district court ruled in favor of a psychology graduate student who challenged the constitutionality of the university's policy on discrimination.[260] The court found that the terms of the policy which prohibited "stigmatizing or victimizing" individuals or groups from a protected status was too vague. The vague policy violated the due process clause and resulted in a restriction against free speech.

A case which involved trespassing was reversed by the Ohio Court of Appeals.[261] The university student was originally arrested for criminal trespass at a park located on campus after being caught building a fire inside a park building. The student's conviction was reversed due to the fact that there were no signs of communication at the point of entrance to the park stating restrictions on the use of the park or particular buildings. In Texas, ten college students were arrested for disruptive activity on campus during an anti-apartheid demonstration.[262] The court of appeals denied a rehearing and affirmed the judgment of the trial court. Furthermore, civil rules setting forth grounds for recusal of judges do not apply in criminal cases.

In Washington, D.C., a student sued a university for violation of the Rehabilitation Act.[263] The student had tested positive for Acquired Immune Deficiency Syndrome (AIDS) antibodies, and this information was improperly leaked to unauthorized personnel which eventually resulted in his withdrawal from the university. The district court found that the intentional infliction of emotional distress and invasion of privacy claims were barred by the statute of limitations. The absence of these common law claims and the failure to allege physical injury meant only equitable damages under the Rehabilitation Act could be recovered.

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[258] The Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989).

[259] Frank v. Ivy Club, 576 A.2d 241 (N.J. 1990).

[260] Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[261] State v. McMechan, 549 N.E.2d 211 (Ohio Ct. App. 1988).

[262] Arnold v. State, 778 S.W.2d 172 (Tex. Ct. App. 1989).

[263] Doe v. Southeastern Univ., 732 F. Supp. 7 (D.D.C. 1990).

In California, a former student filed a petition to disqualify a temporary judge who was hearing his motion.[264] The student sued the university after the institution failed to change errors on his transcripts. The state court, on appeal, found no grounds to disqualify the judge.

Liability

Personal Injury. Injuries to one's body, good name, or well being have come before the courts. Cases range from issues of jurisdiction to the actions or failure of actions as the cause of the injury. The cases may involve an individual who enters the campus area as an invitee or a faculty, staff, or student from the institution.

Jurisdictional questions were before the court. An Illinois case involved the question of whether the lower court had jurisdiction over the personal injury case of a gymnastics student which resulted from the actions of a university faculty member.[265] While the state supreme court could decide the merits, the lower court had jurisdiction, and the matter was remanded for a decision on the merits. In Missouri, the plaintiff alleged that the enactment of a law which removes the state's sovereign immunity defense should allow her case to be reopened when judgment was rendered prior to the enactment of the new law.[266] The retroactive nature of the act was not intended to reopen court decisions already rendered. In Colorado, the waiving of sovereign immunity injuries resulting from the operation of public hospitals, correctional facilities, and jails did not apply to injuries to animals treated at a public university's veterinary hospital.[267] Ohio decided that a statute which prevented tort action against an architect or contractor more than ten years after the completion of the project was constitutional.[268] A residence hall student attempted to sue the architect for design flaws which were the cause of his hand going through a glass door. A California college emergency technical training course was immune from liability by state law.[269] The federal district court found that the state of Louisiana had sovereign immunity in a case involving claims from a fall off a public university's assembly center stage.[270]

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[264] McCartney v. Superior Court, 273 Cal. Rptr. 250 (Dist. Ct. App. 1990).
[265] Healy v. Vaupel, 549 N.E.2d 1240 (Ill. 1990).
[266] Anderson v. Central Mo. State Univ., 789 S.W.2d 41 (Mo. Ct. App. 1990).
[267] State v. Hartsough, 790 P.2d 836 (Colo. 1990).
[268] Sedar v. Knowlton Constr. Co., 551 N.E.2d 938 (Ohio 1990).
[269] McAlexander v. Siskiyou Joint Community College, 272 Cal. Rptr. 70 (Ct. App. 1990).
[270] Hinson v. Belcher, 736 F. Supp. 711 (M.D. La. 1990).

Specific claims for injury were in the process of being litigated. A Wyoming case involved a college professor who was charged with causing fear and apprehension of imminent bodily contact when he jumped up, ran towards the student's table yelling, and banged his fist on the table.[271] The professor's summary judgment motion was denied, and the case was remanded for adjudication.

Several cases involved injuries sustained while individuals were walking on campus. A Georgia appeals court affirmed the lower court grant of summary judgment to the institution as the plaintiff failed to show that the cause of her fall and injuries was a hole later discovered in the concrete parking deck.[272] In Ohio, the court found that the institution was not liable for the natural accumulation of ice and snow on a gravel parking lot which the institution kept plowed.[273] However, a New York court found that the defective repair of a sidewalk raised issues of fact.[274] The subcontractor who completed the repairs was denied summary judgment even though the work was accepted.

Finally, several players injured during athletic competition brought personal injury claims. A soccer player was unsuccessful in his claim against opponents and the university for improper supervision.[275] In another case, a Minnesota rugby player who sustained a broken neck in the second Saturday match at a Louisiana rugby tournament was unsuccessful in claims against the university and the tournament.[276] The court found that the institution sponsoring the tournament was not responsible for the preparedness of the members of a visiting team participating in the tournament.

Claims regarding injury to one's good name or slander and defamation were before the courts. An attorney who was acquitted of extortion charges brought malicious prosecution charges against the president and other officials of a private college.[277] The attorney was unable to show the charges made by the institution were false. A medical professor's action of filing complaints with both senior administrators at the university and the AAUP constituted invited libel in the forwarding of allegedly libelous letters and memoranda by the department chair.[278] A student convicted of murder on the night he attended a fraternity party failed to state a cause of action against the fraternity for defamation or personal injury due to incarceration.[279] Finally, a faculty member involved in a controversy over parking was unsuccessful in his claim of false arrest.[280] The court found that the faculty member consented to arrest when he climbed into his illegally parked car which was then towed away.

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[271] Jung-Leonczynska v. Steup, 782 P.2d 578 (Wyo. 1989).

[272] Evans v. Green, 391 S.E.2d 10 (Ga. Ct. App. 1990).

[273] Coletta v. University of Akron, 550 N.E.2d 510 (Ohio Ct. App. 1988).

[274] Sternbach v. Cornell Univ., 558 N.Y.S.2d 252 (App. Div. 1990).

[275] Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989).

[276] Fox v. Board of Supervisors, 559 So. 2d 850 (La. Ct. App. 1990).

[277] Hardge-Harris v. Pleban, 741 F. Supp. 764 (E.D. Mo. 1990).

[278] Sophianopoulos v. McCormick, 385 S.E.2d 682 (Ga. Ct. App. 1989).

Workers' Compensation. Injury while on the job raised questions about the payment of workers' compensation insurance. Questions revolve around whether the worker is qualified to receive salary compensation or vocational rehabilitation benefits and the amount of awarded benefits.

Qualification to receive compensation was at issue in a number of state cases. In a case reported last year,[281] the court, on appeal, affirmed a lower court decision covering a college employee for injury received while doing volunteer work for the college's charitable foundation.[282] In another case, the court found that workers' compensation was not the only remedy for a charge of intent to inflict emotional distress alleged against a plaintiff's supervisor.[283] The plaintiff, unable to work due to psychological stress created by the supervisors harassment, raised significant issues to thwart a summary judgment motion. A Colorado court ruled that the worker was qualified to receive temporary disability until a vocational rehabilitation program commenced.[284] A Wisconsin court affirmed that a nineteen-year-old Illinois worker was found qualified for disability payments and rehabilitation even though he had only worked for the company one month at the time of injury.[285] The court also ruled that the Illinois workers' compensation board was the appropriate agency to approve the plaintiff's five-year engineering degree as an appropriate compensative vocational rehabilitation plan. A Vermont court found that a university student serving as a volunteer fireman did not qualify for workers' compensation stemming from an injury while on duty with the university-sponsored fire department.[286] Foster parents were not employees who qualified for workers' compensation.[287] A college racket sport instructor, injured but not totally disabled, qualified for partial disability compensation.[288] The spouse of a claimant who committed suicide, allegedly due to work related stress, did not qualify for workers' compensation.[289] In a related case, the workers' compensation board was not authorized to award attorney fees and penalties.[290]

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[279] Van Mastrigt v. Delta Tau Delta, 573 A.2d 1128 (Pa. Super. Ct. 1990).

[280] Beraho v. South Carolina State College, 394 S.E.2d 28 (S.C. Ct. App. 1990).

[281] *See* The Yearbook of Education Law 1990 at 240, Kim v. Mt. Hood Community College, 769 P.2d 239 (Or. Ct. App. 1989).

[282] Mt. Hood Community College v. Kim, 795 P.2d 1100 (Or. Ct. App. 1990).

[283] King v. Brooks, 788 P.2d 707 (Alaska 1990).

[284] Northeastern Junior College v. Kenyon, 783 P.2d 853 (Colo. 1989).

[285] Beloit Corp. v. State Labor and Industry Review Comm'n, 449 N.W.2d 299 (Wis. Ct. App. 1989).

[286] Wolfe v. Yudichak, 571 A.2d 592 (Vt. 1989).

[287] Murray State College v. Akins, 794 P.2d 1218 (Okla. Ct. App. 1990).

[288] McGehee v. Broward Community College, 559 So. 2d 368 (Fla. Dist. Ct. App. 1990).

Additional cases determining eligibility to receive workers' compensation follow. The change in a private university employee's medical condition made her eligible for compensation for permanent, total disability.[291] An injured North Dakota worker was eligible for rehabilitation training for a future job which would return him to 90% of his pre-injury earning capacity, but a two-year associate degree in accounting was not sufficient to achieve that end.[292] In a Florida case, the court, on appeal, found that a lump sum payment was insufficient for a disabled worker injured at the college.[293] Additionally, an employer university attempted to recover credit against employee compensation payments.[294] Credit was sought and denied by the courts for a third party settlement paid to surviving family members following the employee's fatal automobile accident.

Contract Liability. Legislative authority was at issue in a Minnesota case where a public university entered into contract with a private firm to install an alternate fuel system at its heat plant.[295] The contract was contingent on continued appropriations by the legislature. The court found that appropriations to the institution's noninstructional funds were continued legislative appropriations, but a bill passed to pay only the interest on bonds, which were part of the contract but not the principle amount due, represented action by the legislature to cancel the project. A Wisconsin court found that action by a subcontractor against the public university was barred by eleventh amendment immunity.[296] A college's action against a manufacturer of building products was barred by the statute of limitations.[297] The court further ruled that notification in 1979 of the possible defect with the recommendation to seek independent inspection removed any deceptive practice claim. A Vermont court found in a product liability claim that the statute of limitations accrued at the time the institution became aware that asbestos was used in the building's plaster, and not at the time of installation.[298] The District of Columbia Court of Appeals refused to certify an interlocutory on the construction of a track facility which is pending before a federal district court.[299]

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[289] Holford v. Regents of Univ. of Cal., Los Alamos Nat'l Laboratory, 796 P.2d 259 (N.M. Ct. App. 1990).

[290] Ashley v. University of Or. and SAIF, 787 P.2d 506 (Or. Ct. App. 1990).

[291] Styron v. Duke Univ. Hosp., 385 S.E.2d 519 (N.C. App. 1989).

[292] Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989).

[293] Tallon v. University of Miami, 564 So. 2d 1202 (Fla. Dist. Ct. App. 1990).

[294] Bridges v. Texas A & M Univ. Sys., 790 S.W.2d 831 (Tex. Ct. App. 1990).

[295] First Trust Co., Inc. v. State, 449 N.W.2d 491 (Minn. Ct. App. 1989).

[296] Romco, LTD. v. Outdoor Aluminium, Inc., 725 F. Supp. 1033 (W.D. Wis. 1989).

[297] Northampton County Area Community College v. Dow Chemical, 566 A.2d 591 (Pa. Super. Ct. 1989).

[298] University of Vt. v. W.R. Grace & Co., 565 A.2d 1354 (Vt. 1989).

A question of a private right of action against a federal contractor was at issue in a case involving the Rocky Flats nuclear munitions manufacturing facility.[300] Private individuals brought fraud charges against individual employees of a federal project operated by a California university. The court ruled that private parties could bring such claims against employees working at a federally owned facility under the *qui tam* provisions of the False Claims Act.[301] Jurisdiction under the doctrine of *nullum tempus occurit regi*, which protects state agencies against the statute of limitation, was applied to the claim of a public college and state facilities authority against the building contractor of a student union building.[302] In another jurisdictional case, the court affirmed the right of a paint supplier faced with a suit by a public college to remove the case to federal court under the concept of diversity of jurisdictions.[303] However, a North Carolina court ruled that the claims of a contractor and subcontractor against a public institution based on certain omissions of the state during the construction of a university library were barred by sovereign immunity.[304]

An Alabama case involved the violation of a contractor's due process rights in the termination of a contract. The federal district court granted summary judgment to the institution, and the case was remanded on appeal.[305] On remand the federal district court again issued summary judgment in favor of the university hospital, and the court of appeals affirmed that decision.[306] The court found that the breach of contract claim was not sufficient to support either a constitutionally protected property interest or a claim under section 1983. Another court denied a summary judgment in a conflict over the intent of the United States Army and a university to enter into a contract to deliver educational programs on the base.[307]

Product liability was at issue in a case involving asbestos. A jury trial found that asbestos used in plaster was not a significant health risk for asbestos related disease because asbestos levels found in the building were no higher than those occurring outside in the environment. On appeal the court refused to hear the case finding that the institution had failed to refute the evidence presented at trial.[308]

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[299] Georgetown Univ. v. Sportec Int'l, 572 A.2d 119 (D.C. 1990).

[300] United States v. Rockwell Int'l Corp., 730 F. Supp. 1031 (D. Colo. 1990).

[301] 31 U.S.C. 3730(b) *et seq.* (1982).

[302] New Jersey Educ. Facilities Auth. v. Conditioning Co., 567 A.2d 1013 (N.J. Super. Ct. App. Div. 1989).

[303] University of R.I. v. A.W. Chesterton Co., 721 F. Supp. 400 (D.R.I. 1989).

[304] Bolton Corp. v. State, 383 S.E.2d 671 (N.C. Ct. App. 1989).

[305] *See* The Yearbook of Education Law 1989 at 243, Medical Laundry Serv. v. Board of Trustees of Univ. of Ala., 840 F.2d 840 (11th Cir. 1988), *modif'd*, 856 F.2d 128 (11th Cir. 1989).

[306] Medical Laundry Serv. v. Board of Trustees of Univ. of Ala., 906 F.2d 571 (11th Cir. 1990).

[307] Webster Univ. v. United States, 20 Cl. Ct. 429 (1990).

A carpet installer was successful in maintaining that the contract did not contain a specific completion date and that he acted promptly in completing the installation in the student living units.[309] The court also held that the institution was responsible for both the unanticipated extra preparation work on the floors and installer overtime to meet the school's fall occupancy date.

Negligence. The injury of a student who lost his arm while cleaning a printing press was before the courts.[310] The manufacturer of the printing press sued the institution as a third party for failure to properly supervise the student. The court noted that state law failed to recognize claims based on the active-passive negligence doctrine. The court dismissed the case for lack of diversity.

Criminal acts resulted in negligence claims. In a California case, a plaintiff arrested and released with charges being dropped sued the institution for malicious prosecution.[311] The court found that the act of dismissing charges alone would not support a malicious prosecution claim. In another case, the court found no negligence on the part of the institution in the criminal conduct of the plaintiff's ex-husband.[312] The plaintiff was abducted by her ex-husband at gunpoint from a university parking lot and was injured in a shooting incident. A Texas court found that a charge against a university for negligence was barred by the intentional tort exception to the tort claims act.[313] In this case, the plaintiff, who had reported that a dormitory door was being left unlocked because a key was broken off in the lock, was raped in her dormitory room. In a case involving alcohol consumption at a fraternity party where a fire was alleged to have been set by the minor student in another fraternity, neither the national fraternity nor the university was found negligent.[314] The minor student was unable to show that the failure of the university and the national fraternity to control alcohol consumption was the cause of the fire. The court commented on the perceptions of the relationship between students and the university which it characterized as "antithetical to the heightened duty" proposed in this case.[315]

Alcohol consumption was at issue in another case. An intoxicated football player who was previously involved in an incident of violence against the residence hall staff, assaulted a student at a party in a residence hall where alcohol was consumed.[316] The assaulted student sued the university for a breach of contract and negligence in its failure to provide a secure and properly supervised dormitory environment. The court rejected both claims relying on the relationship between college students and today's institutions where, without "*in loco parentis*," the duty of care to safeguard students' welfare is considerably lessened.[317]

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[308] Board of Trustees of Johnson County Community College v. National Gypsum Co., 733 F. Supp. 1413 (D. Kan. 1990).

[309] Turner Brooks of Ohio, Inc. v. Bowling Green State Univ., 554 N.E.2d 956 (Ohio Ct. Cl. 1989).

[310] Leick v. Schnellpressenfabrik Ag Heidelberg, 128 F.R.D. 106 (S.D. Iowa 1989).

[311] Farajpour v. University of S. Cal., 270 Cal. Rptr. 356 (Ct. App. 1990).

[312] Klobuchar v. Purdue Univ., 553 N.E.2d 169 (Ind. Ct. App. 1990).

[313] Delaney v. University of Houston, 792 S.W.2d 733 (Tex. Ct. App. 1990).

[314] Alumni Assoc. v. Sullivan, 572 A.2d 1209 (Pa. 1990).

[315] *Id.* at 1213.

Other cases involved negligence on university premises. An Alabama court held that the public institution was immune from prosecution of the claims of a student injured during a class.[318] However, a New York court found that the failure of the institution's placement office to change the name of the plaintiff represented a triable claim.[319] In another case, the court found that evidence raised viable issues as to whether the institution was negligent in its failure to foresee that a hole in an athletic field might cause injury.[320] Another institution was not found negligent for the accumulation of snow and ice on its steps during a storm which resulted in the plaintiff's fall,[321] nor was Kent State University found negligent in the maintenance of its residence hall stairs.[322] In the drowning of a handicapped invitee, a public institution was found to be immune from prosecution.[323] The failure of the institution to provide lifeguards did not come under the "defects of the land" nor "real estate exceptions" to immunity.[324] Finally, a New Jersey court denied summary judgment to a fraternity in a negligence suit regarding a fall on the sidewalk in front of the fraternity.[325]

Deceptive Practices. In Illinois, an institution was charged with deceptive practices because it did not have an accredited nursing program. Plaintiffs sued the institution after they were informed in a second year class that the program was not accredited.[326] The court granted summary judgment to the institution which it found never claimed to be accredited.

Defamation. In California, a faculty member and former program chair charged that a report on undergraduate courses was defamatory.[327] The court ruled that the report of the committee was privileged communication made without malice and was an opinion not subject to a libel claim.

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[316] Crow v. State, 271 Cal. Rptr. 349 (Ct. App. 1990).

[317] *Id.* at 359.

[318] Riggs v. Bell, 564 So. 2d 882 (Ala. 1990).

[319] Harris v. New York Univ., 556 N.Y.S.2d 586 (App. Div. 1990).

[320] Henig v. Hofstra Univ., 553 N.Y.S.2d 479 (App. Div. 1990).

[321] Goldman v. State, 551 N.Y.S.2d 641 (App. Div. 1990).

[322] Baldauf v. Kent State Univ., 550 N.E.2d 517 (Ohio Ct. App. 1988).

[323] Musheno v. Lock Haven Univ. of Pa., 574 A.2d 129 (Pa. Commw. Ct. 1990).

[324] *Id.* at 131.

[325] Gilhooly v. Zeta Psi Fraternity, 578 A.2d 1264 (N.J. Super. Ct. Law Div. 1990).

[326] Lidecker v. Kendall College, 550 N.E.2d 1121 (Ill. App. Ct. 1990).

[327] Rosenthal v. Regents of the Univ. of Cal., 269 Cal. Rptr. 788 (Ct. App. 1990).

A Pennsylvania assistant basketball coach sued a Kentucky newspaper for defamation.[328] A high school basketball recruit retracted a claim that the assistant coach had offered him money to play basketball at a Pittsburgh university. A year later the Kentucky publisher printed the information on the claim, but not the basketball players retraction. The court, finding that no public controversy existed at the Pittsburgh school prior to the publication of these allegations, ruled that the plaintiff was not a limited purpose public figure and remanded the case for a determination of whether the newspaper acted with malice.

Educational Malpractice. A former Nebraska basketball player, who after four years of eligibility failed to receive a degree and whose tuition was paid by the university for attendance at a private elementary school, sued the private institution under a claim of educational malpractice and breach of contract.[329] The player claimed the institution recruited him knowing he lacked the skills to be successful in college and advised him to take "bone head courses" during his four years of eligibility to play basketball, leaving him without an education or a degree. The court, finding no basis for any of his claims, including the malpractice claim, commented that "[e]ducational malpractice is a tort theory beloved by commentators, but not by courts. While often proposed as a remedy for those who think themselves wronged by educators, . . . educational malpractice has been repeatedly rejected by the American courts . . . ."[330]

A plaintiff sued an institution for both breach of contract and negligence claims because of a three month delay in the receipt of his master's degree.[331] The plaintiff, who spoke to his advisor about his research project, thought he had approval and went to Yellowstone National Park to do his research. The National Park, under its own regulations on research permits, refused to allow research unless the party had an approved proposal. The plaintiff subsequently changed his committee, conducted research, received the degree, but claimed the delay caused loss of three months earnings. The court rendered judgment for the institution finding a communication problem and plaintiff's failure to pursue all avenues to prevent the delay as the basis of this problem. In an Indiana case, the court found that educational malpractice was not a constitutional claim and was not cognizable under a section 1983 claim.[332]

Medical Malpractice. Several medical malpractice cases were brought against governmental entity owned hospitals or their staff. Several courts ruled that the hospital and its staff were protected by sovereign immunity.[333] In a case on the appropriateness of the prescriptions used in a heart transplant, the court found that the decision on the combination of drugs to be prescribed was discretionary, giving the physician immunity.[334] In Virginia, the court found that a physician was not negligent, nor was he acting as an agent of the hospital, in a patient injury claim.[335]

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[328] Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990).

[329] Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).

[330] *Id.* at 1327.

[331] Smith v. Ohio State Univ., 557 N.E.2d 857 (Ohio Cl. Ct. 1990).

[332] Bishop v. Indiana Technical Vocational College, 742 F. Supp. 524 (N.D. Ind. 1990).

Several cases involved actions of the physicians. For example, a Florida case raised questions of whether, after urological surgery, the physicians were forthcoming about the nature of a leg problem and whether the physicians were acting as state medical school professors or as private physicians.[336] On appeal another court found that questions needed to be resolved as to whether negligence was the cause of the injury to a patient during surgery performed by a surgical resident of the university hospital.[337] Finally, an insurance company was unable to state a claim against the physician and hospital it insured, which lost a malpractice case, requiring the insurance company to settle the malpractice claim.[338]

Indemnification. In one case, a private university brought a claim against a liability insurance company for failure to defend the institution in several legal claims.[339] The court remanded the case finding that the institution possessed a right to recover for each separate legal expenditure incurred because of the insurance company's refusal to defend. In another case, the court denied summary judgment finding it necessary to determine whether a physician was acting as a state employee or was under a private practice plan during surgery which resulted in a malpractice claim.[340] If operating as a private physician, the physician's insurer is liable; if operating as a state employee, the institution is liable.

ANTITRUST

The Sherman Antitrust Act was at issue in a case involving an Oklahoma public university and a private book dealer.[341] The institution extended credit to students for the purchase of books in the school operated bookstore. The court found that state action immunity exemptions under the "Parker Doctrine" applied to the institution and its bookstore because a "clear articulation" existed which substantiated that the policies and operation of the public institution made it a state entity.

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[333] Blue v. Pursell, 793 S.W.2d 823 (Ky. Ct. App. 1989); Joplin v. University of Mich., Bd. of Regents, 459 N.W.2d 70 (Mich. Ct. App. 1990).

[334] DeRocco v. Harper Grace Hosp., 451 N.W.2d 549 (Mich. Ct. App. 1989).

[335] Floyd v. Humana of Va., Inc., 787 S.W.2d 267 (Ky. Ct. App. 1990).

[336] Martin v. Drylie, 560 So. 2d 1285 (Fla. Dist. Ct. App. 1990).

[337] Shepard v. Sisters of Providence in Or., 793 P.2d 1384 (Or. Ct. App. 1990).

[338] Aetna Casualty & Sur. Co. v. Oregon Health Sciences Univ., 793 P.2d 320 (Or. 1990).

[339] Duke Univ. v. St. Paul Mercury Ins. Co., 384 S.E.2d 36 (N.C. Ct. App. 1989).

[340] Frontier Ins. Co. v. State, 550 N.Y.S.2d 243 (Ct. Cl. 1990).

[341] Cowboy Book, Ltd. v. Board of Regents for Agriculture and Mechanical Colleges, 728 F. Supp. 1518 (W.D. Okla. 1989).

PATENTS

In the lead off case to this section, a plaintiff claimed the rights to cellular bodily materials extracted from him by researchers.[342] The plaintiff not only claimed the right to patented cell lines, but also to conversion of those materials into economic gain. Remanding the case, the California Supreme Court found that the institution and its physician researchers failed to adequately inform the plaintiff of the uses of the bodily material being extracted which constituted a breach of fiduciary duty and informed consent. However, the court denied his right to economic conversion.

A patent infringement charge was brought against a Tennessee university and two of its professors.[343] The plaintiff alleged that the university and the faculty had infringed his patent on a structural design by using it as part of a proposal for a defense contract. The court found that the university had an absolute immunity from prosecution, but denied the defendant's motion to dismiss because questions existed as to whether the professors had qualified immunity. In another patent infringement case, the court ruled that venue is appropriate in any district where the corporation does business and is subject to personal jurisdiction.[344]

The state of New York passed a law called the Standardized Testing Act[345] requiring the disclosure of test questions, answers, answer sheets, and related research on the tests. The Association of American Medical Colleges sued alleging a conflict with and violation of the federal copyright laws.[346] The federal district court agreed and granted a motion for summary judgment in favor of the Association.

In another case, a patent examiner denied a patent to a professor for a chemical compound used in the treatment of cancer because it had appeared in a "printed publication."[347] The court found that a thesis is not a "printed publication" within the meaning of the statute and reversed the examiner's ruling.

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[342] Moore v. Regents of University of Cal., 793 P.2d 479 (Cal. 1990).
[343] Kersavage v. University of Tenn., 731 F. Supp. 1327 (E.D. Tenn. 1989).
[344] Florida Bd. of Regents v. Armesto, 563 So. 2d 1080 (Fla. Dist Ct. App. 1990).
[345] New York Educ. Law 340-348 (known as the "Truth-in-Testing Act").
[346] Association of Am. Medical Colleges v. Carey, 728 F. Supp. 873 (N.D.N.Y. 1990).
[347] *In re* Cronym, 890 F.2d 1158 (D.C. Cir. 1989).

ESTATES and WILLS

A Georgia court found that the institution had not failed to comply with the wishes of the donor in the disbursement of a scholarship fund.[348] The court refused to return the gift to the donor.

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[348] Hawes v. Emory Univ., 374 S.E.2d 328 (Ga. Ct. App. 1988).

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